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COMMENTARIES

ON

The Laws of England:

IN FOUR BOOKS;

WITH

AN ANALYSIS OF THE WORK.

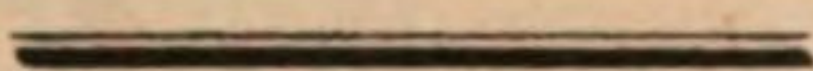


BY

SIR WILLIAM BLACKSTONE, KNT.

ONE OF THE

JUSTICES OF THE COURT OF COMMON PLEAS.



VOL IV.

The Nineteenth Edition.

WITH THE LAST CORRECTIONS OF THE AUTHOR, AND COPIOUS
NOTES.

BY ARCHER RYLAND, ESQ.

OF GRAY'S INN, BARRISTER AT LAW.



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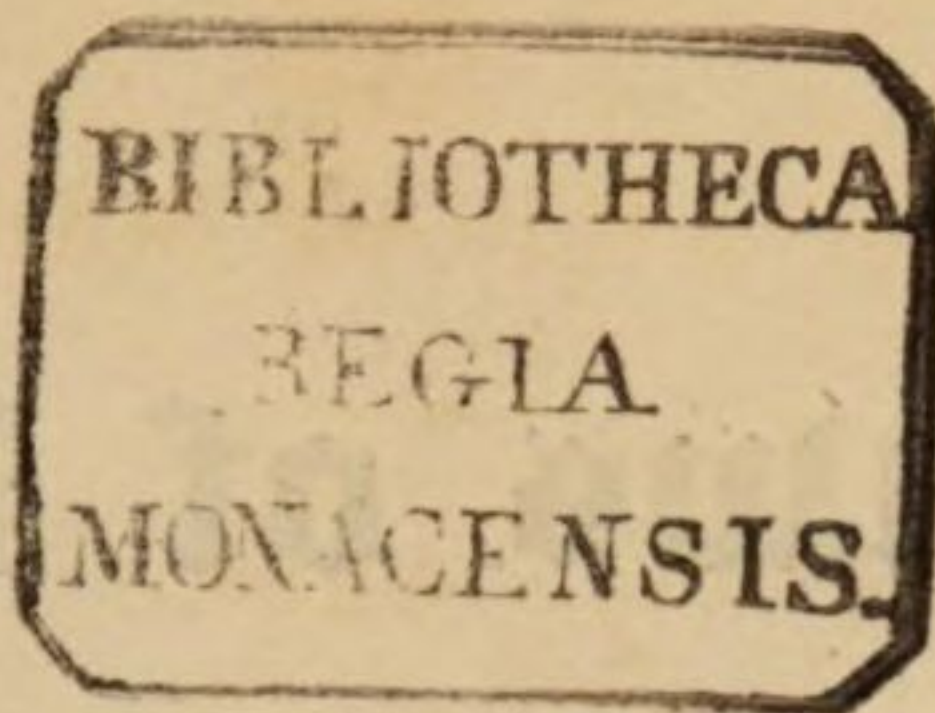
S. SWEET, 1, CHANCERY LANE;

A. MAXWELL, 32, AND STEVENS & SONS, 39, BELL YARD,

Law Booksellers & Publishers:

AND MILLIKEN & SON, GRAFTON STREET, DUBLIN.

1836.



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BY

SIR WILLIAM BLACKSTONE, KNT.

OF THE

VOL. II.

(The second edition.)

WITH THE

NOTES

BY ARTHUR RYLAND, ESQ.

OF THE

—

LONDON :

PRINTED BY RAYNER AND HODGES,
Shoe Lane, Fleet Street.

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THE UNIVERSITY OF CHICAGO

CHICAGO, ILL.

TO THE PRESIDENT OF THE UNIVERSITY OF CHICAGO
FROM THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES
SUBJECT: A RESOLUTION OF THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES
ADOPTED AT A MEETING OF THE FACULTY HELD AT CHICAGO, ILL., ON MAY 1, 1934.

WHEREAS, the Faculty of the Division of the Physical Sciences, at its meeting held at Chicago, Ill., on May 1, 1934, has considered the report of the Committee on the Proposed Revision of the Constitution of the University of Chicago, and has adopted the following resolution:

Resolved, That the Faculty of the Division of the Physical Sciences, in accordance with the recommendation of the Committee on the Proposed Revision of the Constitution of the University of Chicago, do hereby recommend to the President of the University of Chicago that the proposed revision of the Constitution of the University of Chicago be adopted.

IN WITNESS WHEREOF, the Faculty of the Division of the Physical Sciences, at its meeting held at Chicago, Ill., on May 1, 1934, has caused this resolution to be signed by its members.

ATTEST:
J. H. P. [Signature]
President of the Division of the Physical Sciences

THE UNIVERSITY OF CHICAGO
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ADVERTISEMENT.

THE Editor of the fourth volume of these justly esteemed Commentaries, cannot, now for the second time, submit the result of his labours to the Profession, without, as before, soliciting their favourable consideration in respect of any omissions or inaccuracies that may appear in the course of it. So many of the acts of Parliament mentioned in the text, have within the last few years been either wholly or in part repealed, and the consequent alterations in the criminal law are so numerous, and in some instances so refined, that the greatest care and diligence may have failed to notice them all; though it is hoped, that his anxious endeavours to furnish in the notes a correct analysis of the existing criminal code, will be found not altogether unsuccessful. So much of what is laid down by the learned Commentator as law, is now either modified or abolished, that it will be absolutely necessary for the reader, especially the less experienced student, to peruse and consider the notes, in immediate connection with the text, in his progress through the volume: and, this precaution observed, it is believed, that, as a treatise on criminal law, the work may be studied with some degree of safety and advantage.

Such acts of parliament as have been passed during the period the volume has been in the press, and which therefore could not be noticed in their proper places, will be found, with references to the pages and subject matters to which they respectively apply, in the Addenda.

A. R.

*Lincoln's Inn,
Trinity Vacation, 1836.*

ADVERTISEMENT

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Such acts of Parliament as have been passed during the present year, the volume has been in the press, and which therefore could not be noticed in their proper places, will be found, as to references to the pages and subject matters to which they respectively apply, in the Appendix.

ANALYSIS

OF

BOOK IV.*

OF PUBLIC WRONGS.

CHAPTER I.

ON THE NATURE OF CRIMES, AND THEIR PUNISHMENT.

1. IN treating of public wrongs may be considered, I. The general nature of crimes and punishments. II. The persons capable of committing crimes. III. Their several degrees of guilt. IV. The several species of crimes, and their respective punishments. V. The means of prevention. VI. The method of punishment. Page 1

2. A crime, or misdemeanour, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. 4

3. Crimes are distinguished from civil injuries, in that they are a breach and violation of the public rights, due to the whole community, considered as a community. 5

4. Punishments may be considered with regard to, I. The power, II. The end, III. The measure,—of their infliction. 7

5. The power, or right, of inflicting human punishments, for natural crimes, or such as are *mala in se*, was by the law of nature vested in every individual; but, by the fundamental contract of society, is now transferred to the sovereign power: in which also is vested, by the same contract, the right of punishing positive offences, or such as are *mala prohibita*. 7

6. The end of human punishments is to prevent future offences; I. By amending the offender himself. III. By deterring

* This Analysis is a mere copy of that printed during the life of the author, and must be read as the key to the text only. A perusal of the notes with the text, as suggested in the Advertisement, will possess the student with the alterations in the law, bearing both upon the text and the Analysis. An analysis of the notes might have been added, but, independently of

the labour it would have cost, and the delay it would have caused in the publication of the work, it was feared that it would have rendered the volume too bulky, (the notes amounting in number to nearly seven hundred) and would, perhaps, rather have embarrassed than assisted the reader.

others through his example. III. By depriving him of the power to do future mischief. Page 11

7. The measure of human punishments must be determined by the wisdom of the sovereign power, and not by any uniform universal rule : though that wisdom may be regulated, and assisted, by certain general, equitable, principles. 12

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

1. ALL persons are capable of committing crimes, unless there be in them a defect of will : for, to constitute a legal crime, there must be both a vicious will, and a vicious act. 20

2. The will does not concur with the act, I. Where there is a defect of understanding. II. Where no will is exerted. III. Where the act is constrained by force and violence. 21

3. A vicious will may therefore be wanting, in the cases of, I. Infancy. II. Idiocy, or lunacy. III. Drunkenness ; which doth not, however, excuse. IV. Misfortune. V. Ignorance, or mistake of fact. VI. Compulsion, or necessity ; which is, 1st, that of civil subjection ; 2dly, that of duress *per minas* ; 3rdly, that of chusing the least pernicious of two evils, where one is unavoidable ; 4thly, that of want or hunger ; which is no legitimate excuse. 22—32

4. The king, from his excellence and dignity, is also incapable of doing wrong. 33

CHAPTER III.

OF PRINCIPALS AND ACCESSARIES.

1. THE different degrees of guilt in criminals are, I. As principals. II. As accessaries. 34

2. A principal in a crime is, I. He who commits the fact. II. He who is present at, aiding, and abetting, the commission. 34

3. An accessory is he who doth not commit the fact, nor is present at the commission ; but is in some sort concerned therein, either before or after. 35

4. Accessaries can only be in petit treason, and felony : in high treason, and misdemeanors, all are principals. 35

5. An accessory before the fact, is one who, being absent when the crime is committed, hath procured, counselled, or commanded another to commit it. 36

6. An accessory after the fact, is where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Such accessory is usually entitled to the benefit of clergy ; where the principal, and accessory before the fact, are excluded from it. 37

CHAPTER IV.

OF OFFENCES AGAINST GOD AND RELIGION.

1. CRIMES and misdemeanors, cognizable by the laws of England, are such as more immediately offend, I. God, and his holy religion. II. The law of nations. III. The king and his government. IV. The public, or common-wealth. V. Individuals. *Page 42*

2. Crimes more immediately offending God and religion, are, I. Apostacy. For which the penalty is incapacity, and imprisonment. II. Heresy. Penalty for one species thereof: the same. III. Offences against the established church.—Either, by reviling its ordinances. Penalties: fine; deprivation; imprisonment; forfeiture.—Or, by non-conformity to its worship; 1st, through total irreligion. Penalty: fine. 2ndly, through protestant dissenting. Penalty: suspended (conditionally) by the toleration act. 3rdly, through popery, either in professors of the popish religion, popish recusants convict, or popish priests. Penalties: incapacity; double taxes; imprisonment; fines; forfeitures; abjuration of the realm; judgment of felony, without clergy; and judgment of high treason. IV. Blasphemy. Penalty: fine, imprisonment, and corporal punishment. V. Profane swearing and cursing. Penalty: fine, or house of correction. VI. Witchcraft; or, at least, the pretence thereto. Penalty: imprisonment, and pillory. VII. Religious impostures. Penalty: fine, imprisonment, and corporal punishment. VIII. Simony. Penalties: forfeiture of double value; incapacity. IX. Sabbath-breaking. Penalty: fine. X. Drunkenness. Penalty: fine, or stocks. XI. Lewdness. Penalties: fine; imprisonment; house of correction. 43—65

CHAPTER V.

OF OFFENCES AGAINST THE LAW OF NATIONS.

1. THE law of nations is a system of rules, deducible by natural reason, and established by universal consent, to regulate the intercourse between independent states. 66

2. In England, the law of nations is adopted, in its full extent, as part of the law of the land. 67

3. Offences against this law are principally incident to whole states or nations; but, when committed by private subjects, are then the objects of the municipal law. 67

4. Crimes against the law of nations, animadverted on by the laws of England, are, I. Violation of safe-conducts. II. Infringement of the rights of ambassadors. Penalty, in both: arbitrary. III. Piracy. Penalty: judgment of felony, without clergy. 68—73

CHAPTER VI.

OF HIGH TREASON.

1. CRIMES, and misdemeanors, more peculiarly offending the king and his government, are, I. High treason. II. Felonies injurious to the prerogative. III. *Præmunire*. IV. Other misprisions and contempts. Page 74

2. High treason may, according to the statute of Edward III. be committed, I. By compassing or imagining the death of the king, or queen-consort, or their eldest son and heir; demonstrated by some overt act. II. By violating the king's companion, his eldest daughter, or the wife of his eldest son. III. By some overt act of levying war against the king in his realm. IV. By adherence to the king's enemies. V. By counterfeiting the king's great or privy seal. VI. By counterfeiting the king's money, or importing counterfeit money. VII. By killing the chancellor, treasurer, or king's justices, in the execution of their offices. 76—87

3. High treasons, created by subsequent statutes, are such as relate, I. To papists: as, the repeated defence of the pope's jurisdiction; the coming from beyond sea of a natural-born popish priest; the renouncing of allegiance, and reconciliation to the pope, or other foreign power. II. To the coinage, or other signatures of the king: as, counterfeiting (or, importing and uttering counterfeit) foreign coin, here current; forging the sign manual, privy signet, or privy seal; falsifying, &c. the current coin. III. To the protestant succession: as, corresponding with, or remitting money to, the late pretender's sons; endeavouring to impede the succession; writing or printing in defence of any pretender's title, or in derogation of the act of settlement, or of the power of parliament to limit the descent of the crown. 87—92

4. The punishment of high treason, in males, is (generally) to be, I. Drawn. II. Hanged. III. Embowelled alive. IV. Beheaded. V. Quartered. VI. The head and quarters to be at the king's disposal. But, in treasons relating to the coin, only to be drawn, and hanged till dead. Females, in both cases, are to be drawn and burned alive. 92

CHAPTER VII.

OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

1. FELONY is that offence which occasions the total forfeiture of lands or goods at common law: now usually also punishable with death, by hanging; unless through the benefit of clergy. 94

2. Felonies injurious to the king's prerogative (of which some are within, others without, clergy) are, I. Such as relate to the coin: as, the wilful uttering of counterfeit money, &c.: (to which head some inferior misdemeanors affecting the coinage may be

also referred). II. Conspiring or attempting to kill a privy counsellor. III. Serving foreign states, or enlisting soldiers for foreign service. IV. Embezzling the king's armour or stores. V. Desertion from the king's armies, by land or sea. *Page 98—102*

CHAPTER VIII.

OF PRÆMUNIRE.

1. PRÆMUNIRE, in its original sense, is the offence of adhering to the temporal power of the pope, in derogation of the regal authority. Penalty: outlawry, forfeiture, and imprisonment: which hath since been extended to some offences of a different nature. 103

2. Among these are, I. Importing popish trinkets. II. Contributing to the maintenance of popish seminaries abroad, or popish priests in England. III. Molesting the possessors of abbey lands. IV. Acting as broker in an usurious contract, for more than ten *per cent*. V. Obtaining any stay of proceedings in suits for monopolies. VI. Obtaining an exclusive patent for gunpowder or arms. VII. Exertion of purveyance or pre-emption. VIII. Asserting a legislative authority in both or either house of parliament. IX. Sending any subject a prisoner beyond sea. X. Refusing the oaths of allegiance and supremacy. XI. Preaching, teaching, or advised speaking, in defence of the right of any pretender to the crown, or in derogation of the power of parliament to limit the succession. XII. Treating of other matters, by the assembly of peers of Scotland, convened for electing their representatives in parliament. XIII. Unwarrantable undertakings by unlawful subscriptions to public funds. 115—117

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OF MISPRISIONS AND CONTEMPTS, AFFECTING THE KING AND GOVERNMENT.

1. MISPRISIONS and contempts are all such high offences as are under the degree of capital. 119

2. These are, I. Negative, in concealing what ought to be revealed. II. Positive, in committing what ought not to be done. 119

3. Negative misprisions are, I. Misprision of treason. Penalty: forfeiture and imprisonment. II. Misprision of felony. Penalty: fine and imprisonment. III. Concealment of treasure trove. Penalty: fine and imprisonment. 120-1

4. Positive misprisions, or high misdemeanors and contempts, are, I. Mal-administration of public trusts, which includes the crime of peculation. Usual penalties: banishment; fines; imprisonment; disability. II. Contempts against the king's prero-

gative. Penalty: fine and imprisonment. III. Contempts against his person, and government. Penalty: fine, imprisonment, and infamous corporal punishment. IV. Contempts against his title. Penalties: fine and imprisonment; or, fine and disability. V. Contempts against his palaces, or courts of justice. Penalties: fine; imprisonment; corporal punishment; loss of right hand; forfeiture. . . . Page 121—126

CHAPTER X.

OF OFFENCES AGAINST PUBLIC JUSTICE.

1. CRIMES especially affecting the commonwealth, are offences, I. Against the public justice. II. Against the public peace. III. Against the public trade. IV. Against the public health. V. Against the public police, or economy. . . . 127

2. Offences, against the public justice, are, I. Embezzling or vacating records, and personating others in courts of justice. Penalty: judgment of felony, usually without clergy. II. Compelling prisoners to become approvers. Penalty: judgment of felony. III. Obstructing the execution of process. IV. Escapes. V. Breach of prison. VI. Rescue.—Which four may, (according to the circumstances) be either felonies, or misdemeanors punishable by fine and imprisonment. VII. Returning from transportation. This is felony, without clergy. VIII. Taking rewards, to help one to his stolen goods. Penalty: the same as for the theft. IX. Receiving stolen goods. Penalties: transportation; fine; and imprisonment. X. Theftbote. XI. Common barretry, and suing in a feigned name. XII. Maintenance. XIII. Champerty.—Penalty, in these four: fine, and imprisonment. XIV. Compounding prosecutions on penal statutes. Penalty: fine, pillory, and disability. XV. Conspiracy; and threats of accusation in order to extort money, &c. Penalties: the villainous judgment; fine; imprisonment; pillory; whipping; transportation. XVI. Perjury, and subornation thereof. Penalties: infamy; imprisonment; fine, or pillory; and, sometimes, transportation or house of correction. XVII. Bribery. Penalty, fine, and imprisonment. XVIII. Embracery. Penalty: infamy, fine, and imprisonment. XIX. False verdict. Penalty: the judgment in attain. XX. Negligence of public officers, &c. Penalty: fine and forfeiture of the office. XXI. Oppression by magistrates. XXII. Extortion of officers.—Penalty, in both: imprisonment, fine, and sometimes forfeiture of the office. 128—141

CHAPTER XI.

OF OFFENCES AGAINST THE PUBLIC PEACE.

1. OFFENCES, against the public peace, are, I. Riotous assem-

blies, to the number of twelve. II. Appearing armed, or hunting in disguise. III. Threatening, or demanding any valuable thing, by letter.—All these are felonies, without clergy. IV. Destroying of turnpikes, &c. Penalties: whipping; imprisonment; judgment of felony, with and without clergy. V. Affrays. VI. Riots, routs, and unlawful assemblies. VII. Tumultuous petitioning. VIII. Forcible entry and detainer.—Penalty, in all four: fine, and imprisonment. IX. Going unusually armed. Penalty: forfeiture of arms, and imprisonment. X. Spreading false news. Penalty: fine, and imprisonment. XI. Pretended prophecies. Penalties: fine; imprisonment; and forfeiture. XII. Challenges to fight. Penalty: fine, imprisonment, and sometimes forfeiture. XIII. Libels. Penalty: fine, imprisonment, and corporal punishment. . . . Page 142—153

CHAPTER XII.

OF OFFENCES AGAINST PUBLIC TRADE.

1. OFFENCES, against the public trade, are, I. Owling. Penalties: fines; forfeiture; imprisonment; loss of left hand; transportation; judgment of felony. II. Smuggling. Penalties: fines; loss of goods; judgment of felony, without clergy. III. Fraudulent bankruptcy. Penalty: judgment of felony, without clergy. IV. Usury. Penalty: fine, and imprisonment. V. Cheating. Penalties: fine; imprisonment; pillory: tumbrel; whipping, or other corporal punishment; transportation. VI. Forestalling. VII. Regrating. VIII. Engrossing.—Penalties, for all three: loss of goods; fine; imprisonment; pillory. IX. Monopolies, and combinations to raise the price of commodities. Penalties: fines; imprisonment; pillory; loss of ear; infamy; and, sometimes, the pains of *præmunire*. X. Exercising a trade, not having served as apprentice. Penalty: fine. XI. Transporting, or residing abroad, of artificers. Penalties: fine; imprisonment; forfeiture; incapacity; becoming aliens. . . . 154—160

CHAPTER XIII.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR ECONOMY.

1. OFFENCES, against the public health, are, I. Irregularity, in time of the plague, or of quarantine. Penalties: whipping; judgment of felony, with and without clergy. II. Selling unwholesome provisions. Penalties: amercement; pillory; fine; imprisonment; abjuration of the town. . . . 161-2

2. Offences, against the public police and economy, or do-

mestic order of the kingdom, are, I. Those relating to clandestine and irregular marriages. Penalties: judgment of felony, with and without clergy. II. Bigamy, or (more properly) polygamy. Penalty: judgment of felony. III. Wandering, by soldiers or mariners. IV. Remaining in England, by Egyptians; or being in their fellowship one month. Both these are felonies, without clergy. V. Common nuisances: 1st, by annoyances or purprestures in highways, bridges, and rivers; 2ndly, by offensive trades and manufactures; 3rdly, by disorderly houses; 4thly, by lotteries; 5thly, by cottages; 6thly, by fireworks; 7thly, by evesdropping.—Penalty, in all: fine. 8thly, by common scolding. Penalty: the cucking stool. VI. Idleness, disorder, vagrancy, and incorrigible roguery. Penalties; imprisonment; whipping; judgment of felony. VII. Luxury, in diet. Penalty: discretionary. VIII. Gaming. Penalties: to gentlemen, fines; to others, fine and imprisonment; to cheating gamesters, fine, infamy, and the corporal pains of perjury. IX. Destroying the game. Penalties: fines; and corporal punishment. 162—175

CHAPTER XIV.

OF HOMICIDE.

1. CRIMES, especially affecting individuals, are, I. Against their persons. Against their habitations. III. Against their property. 176

2. Crimes against the persons of individuals, are, I. By homicide, or destroying life. II. By other corporal injuries. 177

3. Homicide is, I. Justifiable. II. Excusable. III. Felonious. 178

Homicide is justifiable, I. By necessity, and command of law. II. By permission of law: 1st, for the furtherance of public justice; 2ndly, for prevention of some forcible felony. 178

5. Homicide is excusable, I. *Per infortunium*, or by misadventure. II. *Se defendendo*, or in self-defence, by chance-medley. Penalty, in both: forfeiture of goods; which however is pardoned of course. 182

6. Felonious homicide is the killing of a human creature, without justification or excuse. This is, I. Killing one's self. II. Killing another. 188

7. Killing one's self, or self-murder, is where one deliberately, or by any unlawful malicious act, puts an end to his own life. This is felony; punished by ignominious burial, and forfeiture of goods and chattels. 189

8. Killing another is, I. Manslaughter. II. Murder. 190

9. Manslaughter is the unlawful killing of another; without

malice, express or implied. This is either, I. Voluntary, upon a sudden heat. II. Involuntary, in the commission of some unlawful act. Both are felony, but within clergy; except in the case of stabbing. Page 191

10. Murder is when a person, of sound memory and discretion, unlawfully killeth any reasonable creature, in being, and under the king's peace; with malice aforethought, either express or implied. This is felony, without clergy; punished with speedy death, and hanging in chains, or dissection. 194

11. Petit treason, (being an aggravated degree of murder), is where the servant kills his master, the wife her husband, or the ecclesiastic his superior. Penalty: in men, to be drawn, and hanged; in women, to be drawn, and burned. 203

CHAPTER XV.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

1. CRIMES affecting the persons of individuals, by other corporal injuries not amounting to homicide, are, I. Mayhem; and also shooting at another. Penalties: fine; imprisonment; judgment of felony, without clergy. II. Forcible abduction, and marriage, or defilement of an heiress; which is felony: also stealing, and deflowering or marrying, any woman-child under the age of sixteen years; for which the penalty is imprisonment, fine, and temporary forfeiture of her lands. III. Rape; and also carnal knowledge of a woman-child under the age of ten years. IV. Sodomy, with man or beast.—Both these are felonies, without clergy. V. Assault. VI. Battery; especially of clergymen. VII. Wounding. Penalties, in all three: fine; imprisonment; and other corporal punishment. VIII. False imprisonment. Penalties: fine: imprisonment; and (in some atrocious cases) the pains of *præmunire*, and incapacity of office or pardon. IX. Kidnapping, or, forcibly stealing away the king's subjects. Penalty: fine; imprisonment; and pillory. 205—219

CHAPTER XVI.

OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

1. CRIMES, affecting the habitations of individuals, are, I. Arson. II. Burglary. 220

2. Arson is the malicious and wilful burning of the house, or outhouse, of another man. This is felony; in some cases within, in others without clergy. 220

3. Burglary is the breaking and entering, by night, into a man-

sion-house; with intent to commit a felony. This is felony, without clergy. Page 222

CHAPTER XVII.

OF OFFENCES AGAINST PRIVATE PROPERTY.

1. CRIMES, affecting the private property of individuals, are,
I. Larceny. II. Malicious mischief. III. Forgery. 229

2. Larceny is, I. Simple. II. Mixed, or compound. 229

3. Simple larceny is the felonious taking, and carrying away, of the personal goods of another. And it is, I. Grand larceny; being above the value of twelve pence. Which is felony; in some cases within, in others without, clergy. II. Petit larceny; to the value of twelve pence or under. Which is also felony, but not capital; being punished with whipping, or transportation. 229

4. Mixed, or compound, larceny, is that wherein the taking is accompanied with the aggravation of being, I. From the house. II. From the person. 239

5. Larcenies from the house, by day or night, are felonies without clergy, when they are, I. Larcenies, above twelve pence, from a church;—or by breaking a tent or booth in a market or fair, by day or night, the owner or his family being therein;—or by breaking a dwelling-house by day, any person being therein;—or from a dwelling-house by day, without breaking, any person therein being put in fear;—or from a dwelling-house by night, without breaking, the owner or his family being therein, and put in fear. II. Larcenies, of five shillings, by breaking the dwelling-house, shop, or warehouse, by day, though no person be therein;—or, by privately stealing in any shop, warehouse, coach-house, or stable, by day or night, without breaking, and though no person be therein. III. Larcenies, of forty-shillings, from a dwelling-house or its out-houses, without breaking, and though no person be therein. 239

6. Larceny from the person is, I. By privately stealing, from the person of another, above the value of twelve pence. II. By robbery; or the felonious and forcible taking, from the person of another, goods or money of any value, by putting him in fear. These are both felonies without clergy. An attempt to rob is also felony. 241

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2. It is an exemption of the clergy from any other secular punishment for felony, than imprisonment for a year, at the court's discretion: and it is extended likewise, absolutely, to lay peers, for the first offence; and to all lay commoners, for the first offence also, upon condition of branding, imprisonment, or transportation. *371*

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COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER I.

OF THE NATURE OF CRIMES; AND THEIR PUNISHMENT.

WE are now arrived at the fourth and last branch of these Commentaries; which treats of *public wrongs*, or *crimes* and *misdemesnors*. For we may remember that, in the beginning of the preceding volume (a), wrongs were divided into two species; the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemesnors; with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; *thirdly, their several degrees of guilt, as principals or accessaries; fourthly, the several species of crimes, with the punishment annexed to each by the laws

Public wrongs :
1. Their general nature. 2. The persons capable of committing them. 3. The several degrees of guilt of the offenders. 4. The several species of crimes. 5. The means of preventing them; and, 6. The method of punishing them.

[*2]

(a) Book III. ch. 1.

of England; fifthly, the means of preventing their perpetration; and sixthly, the method of inflicting those punishments, which the law has annexed to each several crime and misdemeanour.

The king the proper prosecutor for all public offences, as the center of all majesty.

First, as to the general nature of crimes and their punishment: the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the *pleas of the crown*; so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence (b).

Importance of a knowledge of the Criminal Law to all classes of the community.

The knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty, is of the utmost importance to every individual in the state. For, (as a very great master of the crown law (c) has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

Great care necessary in framing and enforcing criminal laws. Some rules of conduct laid down.

[*3]

In proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly* forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of

(b) See vol. I. p. 268

(c) Sir Michael Forster, pref. to rep.

the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as Lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress of some very prevalent offence; from some, or from all, of these causes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute inquiries concerning the local constitutions of other nations; the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own (*d*). But even with us in England, where our crown-law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public (1), and our trials in the

Some causes of the inferiority of all criminal to civil codes stated.

Revision and amendment desirable in our own Criminal Code. Some of its imperfections stated, and a remedy suggested.

(*d*) Baron Montesquieu, Marquis Beccaria, &c.

(1) This part of the encomium of the learned judge must be received with some qualification. It was decided in the recent case of *Garnett v. Ferrand*, 9 D. & R. 657; 6 B. & C. 611, that a coroner, in the exercise of his discretion as a judge, may legally exclude from his court any individual not ostensibly connected with the proceedings; yet a coroner's inquisition frequently terminates in an "accusation," as where the jury find a verdict of murder or manslaughter against A. or B. In the case cited, the party excluded was a reporter, so that the intention of the coroner, in which the court of King's Bench held him justified, was to prevent the inquest from being "public:" yet it was impossible for the coroner to know that the inquiry would not terminate in an "accusation" against that very person; and an accusation

made and proved against a man in his absence, can scarcely, in the meaning of the learned judge, be called "public," or "in the face of the world." In a somewhat earlier case of *Cox v. Coleridge*, 2 D. & R. 86; 1 B. & C. 37, it had been held, that a person under examination before justices of the peace, on a charge of felony, has no right to have a legal adviser attending on his behalf, and that the privilege, when allowed, is entirely a matter of discretion in the justices. In that case, too, it seems to have been doubted, whether the rule did not apply even where the decision of the justices is *final*, as on convictions under penal statutes, where no appeal is given. That doubt, however, seems to have been since removed, and it may now, it is apprehended, be considered as law, that a defendant has a right to have

[*4]

face of the world ; where torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception nor even a personal dislike ;—even here we shall occasionally find room to remark some particulars, that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded ; from not *repealing such of the old penal laws as are either obsolete or absurd ; and from too little care and attention in framing and passing new ones. The enacting of penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill ; but be calmly and maturely considered by persons who know what provisions the laws have already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the House of Peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon (*e*). And surely equal precaution is necessary, when laws are to be established, which may affect the property, the liberty, and perhaps even the lives of thousands. Had such a reference taken place, it

(*e*) See Vol. II. p. 345.

the presence and assistance of counsel or attorney, or such legal advice and assistance as he can procure, in the conduct of his defence, on the *final* hearing of an information ; for on such hearing the magistrate is sitting *judicially*, and with power to decide upon law, fact, and punishment, and not as a mere *ministerial* officer in taking examinations. For this position the late case of *Daubeny v. Cooper*, 5 Man. & Ry. 314 ; 10 B. & C. 237, seems an authority, for it was there held, that the proceedings against a party in a summary manner, under the 5 Anne, c. 14, (since repealed, by 1 & 2 W. 4, c. 32), for keeping and

using a gun to destroy game, are of a judicial nature, at which *all* persons have a *primâ facie* right to be present ; and therefore, where a magistrate had, without any specific reason, caused a party, who claimed a right to be present, to be removed from a justice-room where such proceedings were going on, it was held, that he was liable to an action of trespass : see 1 Chitty's Burn, 829. See also, an elaborate note upon the case of *Cox v. Coleridge*, and upon this subject generally, in Paley on Convictions (by Dowling), 27.

is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or to cut down a cherry-tree in an orchard (*f*) (2). Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony, without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians (*g*) (3) (4).

It is true, that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public: but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of any one, who hath undertaken the task of examining the great outlines of the English law, and tracing them up to their principles: and it is the duty of such a one to hint them *with decency to those, whose abilities and stations enable them to apply the remedy. Having therefore premised this apology for some of the ensuing remarks, which might otherwise seem to savour of arrogance, I proceed now to consider (in the first place) the general nature of *crimes*.

The propriety of pointing out such imperfections.

[*5]

I. A crime, or misdemeanour, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours: which, properly speaking, are mere synonymous terms: though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and

Definition of a crime or misdemeanour. Those terms properly synonymous.

(*f*) Stat 9 Geo. I. c. 22; 31 Geo. II. c. 42.

(*g*) Stat. 5 Eliz. c. 20.

(2) The two Acts inflicting this severe punishment are repealed, as far as regards the benefit of clergy, by 4 Geo. IV. c. 54, § 1 & 2; and the offender or offenders, together with their accessaries, are liable, at the discretion of the court, to be transported or imprisoned. And see still more recent enactments with respect to these offences, in 7 & 8 Geo. IV. c. 30, § 15,

19, & 20, *post* 144, 233, and 246.

(3) The 5 Eliz. c. 20, which introduced this crime and its severe punishment, is repealed by the 23 Geo. III. c. 51.—CH.

(4) The 1st Geo. IV. c. 116, repeals the 1st & 2d P. & M. c. 4, which made it a capital felony for gipsies to remain one month in England.

Distinction between crimes and civil injuries. Some examples produced.

omissions of less consequence, are comprised under the gentler names of "misdemesnors" only (5).

The distinction of public wrongs from private, of crimes and misdemesnors from civil injuries, seems principally to consist in this : that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals ; public wrongs or crimes and misdemesnors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity. As, if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime ; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land : but treason, murder, and robbery, are properly ranked among crimes ; since, besides the injury done to individuals, they strike at the very being of society, which cannot possibly subsist, where actions of this sort are suffered to escape with impunity (6).

Every crime includes a public wrong and a civil injury ; and, in some cases, the offender may be compelled to make satisfaction for each separately.

[*6]

In all cases the crime includes an injury : every public offence is also a private wrong, and somewhat more ; it affects the individual, and it likewise affects the community. *Thus treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury ; but, as this species of treason in its consequences principally tends

(5) In the English law *misdemeanor* is generally used in contradistinction to *felony*, and misdemeanors comprehend all indictable offences, which do not amount to felony ; as perjury, battery, libels, conspiracies, &c.—CH.

(6) The distinction between public crimes and private injuries seems entirely to be created by positive laws, and it is referable only to civil institutions. Every violation of a moral law, or natural obligation, is an injury, for which the offender ought to make retribution to the individuals who immediately suffer from it ; and is also a crime, for which he ought to be punished to that extent which would deter both him and others from a repe-

tition of the offence. In positive laws those acts are denominated injuries, for which the legislature has only provided retribution, or a compensation in damages ; but, when from experience it is discovered that this is not sufficient to restrain within moderate bounds certain classes of injuries, it then becomes necessary for the legislative power to raise them into crimes, and to endeavour to repress them by the terror of punishment, or the sword of the public magistrate. The word crime has no technical meaning in the law of England. It seems, when it has a reference to positive law, to comprehend those acts which subject the offender to punishment. When the

to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set for others to do the like. Robbery may be considered in the same view: it is an injury to *private* property; but, were that all, a civil satisfaction in damages might atone for it; the *public* mischief is the thing, for the prevention of which our laws have made it a capital offence. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so

words *high crimes and misdemeanors* are used in prosecutions by impeachment, the words *high crimes* have no definite signification, but are used merely to give greater solemnity to the charge. When the word *crime* is used with a reference to moral law, it implies every deviation from moral rectitude. Hence we say, it is a *crime* to refuse the payment of a just debt; it is a *crime* wilfully to do an injury to another's person or property without making him a satisfaction. To destroy another's property wilfully, without making the owner a compensation is, in all cases, a worse crime in reason than theft; because the individual deprived of his property suffers precisely the same injury, and the public loses the benefit of that property, which contributes to the support of no one; and he, who does the injury, has not the temptation of

him who steals to supply his wants. In the case of those actions which are only civil injuries, and to which no legal punishment is annexed, the law has supposed that retribution will be sufficient to deter from the commission of them. But the wilful and malicious destruction of another's property by fire, in many cases, is punished with death,* so also is the malicious killing and maiming of another's cattle;† yet these detestable and diabolical acts were not crimes by the common law of England; but experience discovered the necessity of rendering them subject to public and severe punishment. Yet to set fire to a field of ripe standing corn is still only a private injury, though this is an act *which strikes at the very being of society*; but the legislature have not yet found it necessary to repress it by the terror of penal laws.‡—CH.

* See *post* 221, n. (2).

† The 9 Geo. I. c. 22, relating to killing and maiming cattle, is repealed; see *post* 245, n. (54).

‡ This has now been done. By 7 & 8 Geo. IV. c. 30, § 17, "if any person shall unlawfully and maliciously set fire to any crop of corn, grain, or

pulse, whether standing or cut down, every such offender shall be guilty of felony, and be liable to be transported for seven years, or to be imprisoned not exceeding two years; and, if a male, to be once, twice, or thrice, publicly or privately whipped." See *post* 244, n. (52).

very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong : which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature in which the public punishment is not so severe, but it affords room for a private compensation also : and herein the distinction of crimes from civil injuries is very apparent. For instance ; in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment : and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages (7). So also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment, as a common offence to the whole kingdom and all his majesty's subjects : but, if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make

[*7] *ample satisfaction, as well for the private injury as for the public wrong.

The object of criminal laws twofold: 1. To redress the injury done : and 2. To prevent the repetition of it.

Upon the whole we may observe that in taking cognizance of all wrongs, or unlawful acts the law has a double view : viz. not only to redress the party injured by either restoring to him his right, if possible ; or by giving him an equivalent ; the manner of doing which was the object of our inquiries in the preceding book of these Commentaries : but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquillity of the whole. What those

(7) The court of Common Pleas will not compel a party who has proceeded both by indictment and action for the same assault, to make his election upon which he will rely. *Jones v. Clay*, 1 Bos. & Pul. 191 ; and, though it was formerly held, that in general, if the party moved for a criminal information, he must abandon any action, that doctrine seems to

have been broken in upon by a very recent case in the court of King's Bench, *Caddy v. Barlow*, 1 Man. & Ry. 275, where it was held in an action by A. for the malicious prosecution by C. of an indictment against A. and B., that a rule for a criminal information obtained by A., and made absolute, was no bar to the action. See also the note to that case, Id. 278.

breaches are, and how prevented or punished, are to be considered in the present book.

II. The nature of *crimes and misdemeanors* in general being thus ascertained and distinguished, I proceed in the next place to consider the general nature of *punishments*: which are evils or inconveniences consequent upon crimes and misdemeanors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure* of human punishment.

The nature of punishments consists in their power, end, and measure.

1. As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemeanors (*h*). It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any *one*, it must also be vested in *all* mankind; since all are by nature equal. Whereof the first murderer *Cain was so sensible, that we find him (*i*) expressing his apprehensions, that *whoever* should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state, (though, in fact, never exercised by any,) of punishing not only their own subjects, but also foreign ambassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt (*k*).

The power of punishment was originally vested in every individual, but has since been transferred by general consent to the magistrate.

[*8]

(*h*) See Grotius, *de j. b. and p.* l. 2, c. 20. Puffendorf, *L. of Nat. and N.* b. 8, c. 3.

(*i*) Gen. iv. 14

(*k*) See vol. I. p. 254.

That general consent renders punishments lawful.

As to offences merely against the laws of society, which are only *mala prohibita*, and not *mala in se* ; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions : and this by the consent of individuals ; who, in forming societies, did either tacitly or expressly invest the sovereign power with a right of making laws, and of enforcing obedience to them when made, by exercising, upon their non-observance, severities adequate to the evil. The lawfulness thereof of punishing such criminals is founded upon this principle, that the law by which they suffer was made by their own consent ; it is a part of the original contract into which they entered, when first they engaged in society ; it was calculated for, and has long contributed to, their own security.

The origin of capital punishments. Their propriety considered.

[*9]

This right, therefore, being thus conferred by universal consent, gives to the state exactly the same power, and no more, over all its members, as each individual member had *naturally over himself or others. Which has occasioned some to doubt, how far a human legislature ought to inflict capital punishments for *positive* offences ; offences against the municipal law only, and not against the law of nature ; since no individual has, naturally, a power of inflicting death upon himself or others for actions in themselves indifferent. With regard to offences *mala in se*, capital punishments are in some instances inflicted by the immediate *command* of God himself to all mankind ; as in the case of murder, by the precept delivered to Noah, their common ancestor and representative (*l*), “ whoso sheddeth man’s blood, by man shall his blood be shed.” In other instances they are inflicted after the *example* of the Creator, in his positive code of laws for the regulation of the Jewish republic ; as in the case of the crime against nature. But they are sometimes inflicted without such express warrant or example, at the will and discretion of the human legislature ; as for forgery, for theft, and sometimes for offences of a lighter kind. Of these we are principally to speak : as these crimes are, none of them, offences against natural, but only against social rights ; not even theft itself, unless it be accompanied with violence to one’s house or person : all others being an infringement of that right of property, which as we have for-

(*l*) Gen. ix. 6.

merely seen (*m*), owes its origin not to the law of nature, but merely to civil society (8).

The practice of inflicting capital punishments, for offences of human institution, is thus justified by that great and good man, Sir Matthew Hale (*n*): "when offences grow enormous, frequent, and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers." It is therefore the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legislature in putting him to death that commits it. *It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood (9). For, though the end of punishment is to deter

The enormity of a crime, and not its frequency, justifies capital punishment.

[*10]

(*m*) Book II. c. 1.

(*n*) 1 Hal. P. C. 13.

(8) It is strange that the learned judge's conclusion, *viz.* that *theft itself is not an offence against natural rights*, did not lead him to suspect the fallacy of the position, that *the right of property owes its origin not to the law of nature, but merely to civil society*, which he has also advanced in a former volume, (2 vol. p. 11.,) and which I have there presumed to controvert. If theft is not a violation of the law of nature and reason, it would follow that there is no moral turpitude in dishonesty. *Thou shalt not steal*, is certainly one of the first precepts both of nature and religion.—CH.

(9) However amiable this doctrine may appear in theory, it is scarcely reducible to practice, at least in the *administration* of our penal laws. Where the punishment of death is often ordained, and comparatively seldom inflicted, as in England, the *frequency*, and not the *enormity* of the crime, must be the standard of lenity or rigour. No man has much frequented our Courts of Criminal Justice, without having heard our judges ex-

pressly assign the increasing frequency of a particular crime as the cause for inflicting death in cases where it would otherwise be, as it had previously been, commuted for some milder punishment. The reduction of capital punishments has been for many years anxiously contemplated by the legislature as a highly desirable object, and has recently been carried into effect to a very considerable extent. We need only mention here, generally, as instances, the crimes of forgery, coining, stealing in a dwelling-house, house-breaking, sacrilege, horse-stealing, and sheep-stealing; these and all other instances of the reduction of capital punishments effected since the time of the learned commentator, will be found specifically noticed under the titles of the several offences to which they apply throughout the volume. Other improvements of an important nature have also been made in our system of punishments, which, though specifically stated in their proper places, may be cursorily mentioned here. The odious practice of punishing females by whip-

men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means ; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offences, or such as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is given ; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital punishments are more effectual ? Was the vast territory of all the Russias worse regulated under the late Empress Elizabeth, than under her more sanguinary predecessors ? Is it now, under Catherine II. less civilized, less social, less secure ? And yet we are assured, that neither of these illustrious princesses have, throughout their whole administration, inflicted the penalty of death : and the latter has, upon full persuasion of its being useless, nay even pernicious, given orders for abolishing it entirely throughout her extensive dominions (o). But, indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded waggons is universally allowed, and many laws have been made to prevent it ; none of which have hitherto proved effectual. But it does not therefore follow, that it would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provision of former statutes. Where the evil to be prevented is not adequate to the violence of the pre-

(o) Grand instructions for framing a new Code of Laws for the Russian Empire, § 210.

ping, has been abolished. The pillory, so objectionable on various accounts, has also, except in the cases of perjury, and subornation of perjury, been abolished, and even in those cases, is seldom or never inflicted ; a fixed and positive measure of punishment has been a-

warded for many offences, and a classification of prisoners, with a discretionary power of awarding solitary confinement for short periods, has been introduced with every appearance of producing the most beneficial effects.

ventive, a sovereign that thinks seriously can never *justify [*11] such a law to the dictates of conscience and humanity. To shed the blood of our fellow-creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of Him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

I would not be understood to *deny* the right of the legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have *doubted* it; but only to suggest a few hints for the consideration of such as are, or may hereafter become, legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it: and to this public judgment or decision all private judgments must submit; else there is an end of the first principle of all society and government. The guilt of blood, if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations that are given by the sovereign power.

The right to inflict capital punishment in any case, doubted.

2. As to the *end*, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the Supreme Being: but as a precaution against future offences of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, “*ut poena* (as Tully (*p*) expresses it) *ad paucos, metus ad omnes, perveniat*,” which gives rise to all ignominious punishments, and to such executions of justice as are open and *public: or [*12] lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery,

The end of punishment is the prevention of crime; the method therefore should be proportioned to the purpose. Death, or perpetual disability, should be inflicted only where the offender appears to be incorrigible.

(*p*) *Pro Cluentio*, 46.—“That few may be punished, and that the fear of punishment may operate on all.”

or exile. The same one end, of preventing future crimes, is endeavoured to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction, or whether he be disabled from doing any farther harm: and, if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore the pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted, but when the offender appears incorrigible: which may be collected either from a repetition of minuter offences; or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment: and in such cases it would be cruelty to the public, to defer the punishment of such a criminal, till he had an opportunity of repeating perhaps the worst of villanies.

The *measure* of punishment must be discretionary in the legislature.

3. As to the *measure* of human punishments. From what has been observed in the former articles we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offences.

The *lex talionis* considered, and shewn to be often unjust, frequently impracticable, and seldom an equivalent to the injury done. This law once introduced in England by the 37 Ed. III. c. 18, but speedily abandoned.

[*13]

Hence it will be evident, that what some have so highly extolled for its equity, the *lex talionis*, or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases indeed it seems to be dictated by natural reason; as in the case of conspiracies to do an injury, or false accusations of the innocent: to which we may add* that law of the Jews and Egyptians, mentioned by Josephus and Diodorus Siculus, that whoever without sufficient cause was found with any mortal poison in his custody should himself be obliged to take it. But, in general, the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see, that, if a court of justice awards a return of the blow, it is

more than a just compensation. On the other hand, retaliation may, sometimes, be too easy a sentence; as, if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered: by decreeing, in imitation of Solon's laws (*q*), that he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death: not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepid assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reason upon which this sentence is grounded seems to be, that this is the highest penalty that man can inflict, *and tends most to the security of mankind, by removing one murderer from the earth, and setting a dreadful example to deter others: so that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury; since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him: especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are

[*14]

(*q*) Pott. Ant. b. 1, c. 26.

not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villany, as the conspirator has also a chance to escape his punishment; and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers (*r*), that the punishment due to the crime of which one falsely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. III. ch. 18, that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead (*s*).

Punishment best regulated by general principles, deduced from the nature and circumstances of the crime.

[*15]

In cases of treason, the intention to commit crime is deservedly punished with more severity than the actual perpetration of it in other cases.

But, though from what has been said it appears, that there cannot be any regular or determinate method of rating the *quantity of punishments for crimes, by any one uniform rule; but they must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment.

As, first, with regard to the object of it: for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore treason in conspiring the *king's* death is by the English law punished with greater rigour than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant an enormity, as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is

(*r*) Beccar. c. 15.

(*s*) Stat. 38 Edw. III. c. 9.

an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract: and that if a man stops even here, it is better for him than if he proceeds: for which reason an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity; not because the intention is equivalent to the act itself, but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

Again: the violence of passion, or temptation, may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment is less penal than upon cool deliberate malice. The age, education, and character of the offender; the repetition (or otherwise) *of the offence; the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime (t).

Circumstances
may extenuate
crimes.

[*16]

Farther: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness (v): and among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit: according to what Cicero observes "*ea sunt animadvertenda peccata maximè, quæ difficillime præcaventur* (u)." Hence it is, that for a servant to rob his master is in more cases capital, than for a stranger: if a servant kills his master, it is a species of trea-

Those crimes
which may most
easily be com-
mitted ought to
be most severely
punished.

(t) Thus Demosthenes (in his oration against Midias) finely works up the aggravations of the insults he had received. "I was abused, (says he), by my enemy, in cold blood, out of malice, not by heat of wine, in the morning, publicly, before strangers as well as citizens; and that in the tem-

ple, whither the duty of my office called me."

(v) Beccar. c. 6.

(u) *Pro Sexto Roscio*. 40.

[Those offences should be most severely punished, against which it is most difficult to guard.—ED.]

son (10); in another it is only murder: to steal a handkerchief, or other trifle of above the value of twelve pence, privately from one's person, is made capital (11); but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And, in the island of Man, this rule was formerly carried so far, that to take away an horse or an ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them or carry them off: but to steal a pig or a fowl, which is easily done, was a capital misdemeanour, and the offender was punished with death (*x*).

A severe Criminal Code is a proof of the dis-temper, or weak constitution of a government.

[*17]

Lastly, as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due *distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action (*y*), that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. For the excessive severity of laws (says Montesquieu) (*z*) hinders their execution: when the punishment surpasses all measure, the public will frequently out of humanity, prefer impunity to it. Thus also the statute 1 Mar. st. 1, c. 1, recites in its preamble, "that the state of every king consists more assuredly in the love of the subject towards their prince, than in the dread of laws made with rigorous pains; and that

(*x*) 4 Inst. 285.

(*y*) Beccar, c. 7.

(*z*) Sp. L. b. 6, c. 13.

(10) This is no longer law. By 9 Geo. IV. c. 31, s. 2, repealing 25 Ed. III. st. 5, c. 2, respecting petit treason, it is enacted, "that every offence which before the commencement of that Act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and that all persons guilty in respect thereof, whether as principals or accessaries, shall be dealt with, indicted, tried, and punished as principals and accessaries in murder." See 1 Hawk. P. C. 6th edit. 105; 5 Chitty's Burn's J. last edit. 551; *post* 75, 203.

(11) This is altered by 7 & 8 Geo. IV. c. 29, s. 6, which enacts, "that if any person shall steal any chattel, money, or valuable security, from the person of another, or shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property of any other person with intent to steal the same, he shall be guilty of felony, and liable to be transported for life, or for not less than seven years, or to be imprisoned for not exceeding four years; and, if a male, to be once, twice, or thrice, publicly or privately whipped."

laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme punishments." Happy had it been for the nation, if the subsequent practice of that deluded princess in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government! We may farther observe, that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell (12).

It is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet *that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not

The impolicy of a sanguinary code of laws. Some examples produced.

[*18]

(12) The most admirable and excellent statute ever passed by the English legislature is the 1 Edw. VI. c. 12.

In the preamble it states, in a beautiful and simple strain of eloquence, that "Nothing is more godly, more sure, more to be wished and desired betwixt a prince, the supreme head and ruler, and the subjects whose governor and head he is, than on the prince's part great clemency and indulgency, and rather too much forgiveness and remission of his royal power and just punishment, than exact severity and justice to be shewed; and on the subjects' behalf, that they should obey rather for love, and for the neces-

sity and love of a king and prince, than for fear of his strait and severe laws. But as in tempest or winter one course and garment is convenient, in calm or warm weather a more liberal case or lighter garment both may and ought to be followed and used; so we have seen divers strait and sore laws made in one parliament (the time so requiring,) in a more calm and quiet reign of another prince by the like authority and parliament taken away," &c.

It therefore repeals every statute which has created any treason since the 25 Edw. III. st. 5, c. 2.

It repeals "all and every act of parliament concerning doctrine or matters of religion."

attempt to cure. It has been therefore ingeniously proposed (*a*), that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least; but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank. Where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus in France the punishment of robbery, either with or without murder, is the same (*b*): hence it is, that though perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder (13). In China murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of a speedy execution, and a subsequent exposure or dissection, robbers have a hope of transportation, which seldom is extended to murderers. This has the same effect here as in China; in preventing frequent assassination and slaughter.

Its tendency to increase crimes stated and explained.

Yet, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parlia-

(*a*) Beccar. c. 6.

(*b*) Sp. L. b. 6, c. 16.

It repeals every felony created by the legislature, during the preceding long and cruel reign of Henry VIII.

It repeals the statute 31 Henry VIII. "that proclamations made by the king's highness, by the advice of his honourable council, should be made and kept as though they were made by authority of parliament."

It repeals also the extraordinary statute *de bigamis*, 4 Edw. I. st. 3, c. 5, which enacted, that if any man married a widow, or married a second

wife after the death of the first, he should be deprived of the benefit of clergy, if he was convicted of any clergyable felony whatever.—CH.

(13) This is not now the law of France. By the present Criminal Code, founded on the Code Napoleon, robbery without murder has ceased to be a capital offence. And the result mentioned by the learned judge has ceased also; nothing is more common now than instances of robberies without murder, in France.

ment (c) to be felonies without benefit of clergy (14); or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders.

*The injured, through compassion (15), will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy (16). Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.

[*19]

(c) See Ruffhead's Index to the Statutes (tit. felony) and the Acts which have since been made.

(14) Most of these rigorous Acts, through the well ascertained policy and humanity of the legislature, have lately been repealed, and milder punishments have been substituted. See the notes to this edition throughout. And see *ante*, 10, n (9).

(15) And from a very natural reluctance to incur the inconvenience and expense attending the prosecution. The expense of individual prosecutors, however, is now considerably diminished by the increased allowance of costs, given by 7 Geo. IV. c. 64; but, as this allowance is made out of the public purse, the enormous expense of criminal prosecutions is still a heavy burthen on the public, and too frequently leads to a defeat of justice, and sometimes, perhaps, even to the compounding a felony.

(16) These observations continue to be too true. It is too common for juries to find the value of stolen property to be below a particular sum, in defiance of positive and unimpeachable testimony to the contrary, for the purpose of screening prisoners from what appears to them too severe a punishment: and there have been verdicts

of manslaughter upon indictments for murder, which it seemed very difficult to reconcile with the evidence adduced, or to account for, upon any other principle than the anxiety of the jury to save the culprit from certain death, even at the expense of their own duties and consciences. The gross absurdity of passing sentence of death upon a criminal, and in the same breath comforting him with the assurance that the sentence will not be put in force, which used to be so frequently witnessed, is now removed by the 4 Geo. IV. c. 48; see *post*, 376, n (3). And there was scarcely less absurdity attendant upon the practice of passing sentence of transportation for *seven* years, which, it was, till very recently perfectly well known by all classes would probably not be put in force: such convicts being almost always discharged after two or three years' detention either in a gaol, or on board the hulks. But in this respect also a practical reform has recently been effected, and sentence of transportation, for whatever term of years, is now almost invariably enforced.

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING
CRIMES.

What persons are, or are not, *capable* of committing crimes none exempt from punishment, but those whom the laws exempt.

HAVING, in the preceding chapter, considered in general the nature of crimes, and punishments, we are next led, in the order of our distribution, to inquire what persons are, or are not, *capable* of committing crimes; or, which is all one, who are exempted from the censures of the law upon the commission of those acts, which in other persons would be severely punished. In the process of which inquiry, we must have recourse to particular and special exceptions; for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

Defect of *will* the only protection from punishment; because a vicious will, and a consequent unlawful act, are necessary to constitute a crime.

[*21]

All the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing *that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiae*, a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an *overt* act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so, on the other hand, an un-

warrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.

Now there are three cases, in which the will does not join with the act: 1. Where there is a defect of understanding. For, where there is no discernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing else but a determination of one's choice to do or to abstain from a particular action: he, therefore, that has no understanding, can have no will to guide his conduct. 2. Where there is understanding and will sufficient, residing in the party; but not called forth and exerted at the time of the action done; which is the case of all offences committed by chance or ignorance. Here the will sits neuter; and neither concurs with the act, nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that it loaths and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which *may be referred to the second; and compulsion or necessity, which may properly rank in the third.

Three species of defect of will.
1. Defect of understanding; as, infancy, idiocy, lunacy, intoxication. 2. Neutrality of will; as, misfortune, ignorance. 3. Constraint of will; as, compulsion, or necessity.

[*22]

I. First, we will consider the case of *infancy*, or nonage; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever (a). What the age of discretion is, in various nations, is matter of some variety. The civil law distinguished the age of minors, or those under twenty-five years old, into three stages: *infantia*, from the birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again subdivided into two equal parts: from seven to ten and an half was *ætas infantie proxima*; from ten and an half to fourteen was *ætas pubertati proxima*. During the first stage of infancy, and the next half stage of childhood, *infantie proxima*, they were not punishable for any crime (b).

Infancy, what by the civil law.

(a) 1 Hawk. P. C. 2.

(b) Inst. 3, 20, 10.

During the other half stage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief: but with many mitigations, and not with the utmost rigour of the law (c). During the last stage (at the age of puberty, and afterwards,) minors were liable to be punished, as well capitally as otherwise.

Infancy, what by the English law in cases of misdemeanor.

[*23]

The law of England does in some cases privilege an infant, under the age of twenty-one, as to common misdemeanors: so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offences (d): for, not having the command of his fortune, till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like (which infants, when full grown, are at least as liable as others to commit,) for these an infant, above *the age of fourteen, is equally liable to suffer, as a person of the full age of twenty-one.

Infancy, what with reference to capital crimes. Power of discerning between good and evil the only true criterion. Some examples produced.

With regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open (e): and from thence till the offender was fourteen, it was *ætas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward the Third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is, that "*malitia supplet ætatem*." Under seven years of age indeed an infant cannot be guilty of felony (f); for then a

(c) Ff. 29, 5, 14, 50, 17, 111, 47, 2, 23.

(d) 1 Hal. P. C. 20, 21, 22.

(e) LL. Athelstan. Wilk. 65.

(f) Mir. c. 4, § 16. 1 Hal. P. C. 27.

felonious discretion is almost an impossibility in nature : but at eight years old he may be guilty of felony (*g*). Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress : and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged ; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion *to discern between good and evil (*h*). And there was an instance in the last century, where a boy of eight years old was tried at Abingdon for firing two barns ; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly (*i*). Thus also, in very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow ; there appearing in his whole behaviour plain tokens of a mischievous discretion ; and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment (*j*). But, in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction (1).

[*24]

(*g*) Dalt. Just. c. 147.(*i*) Emlyn on 1 Hal. P. C. 25.(*h*) 1 Hal. P. C. 26, 27.(*j*) Foster, 72.

(1) A boy under fourteen years of age is presumed by law to be incapable of committing a rape, 1 Hale, 361 ; and it has been held, that he cannot be convicted of an assault with intent to commit one. *Rex v. Eldershaw*, 3 C. & P. 396.

If a child, more than seven and under fourteen years of age, is indicted for felony, it will be left to the jury to say whether the offence was committed by the prisoner, and, if so, whether, at

the time of the offence, the prisoner had a guilty knowledge that he or she was doing wrong. The presumption of law is, that a child of that age has not such guilty knowledge, unless the contrary be proved by the evidence. *Rex v. Owen*, 4 C. & P. 236.

At the completion of fourteen years of age, infants appear to be responsible for any act of felony, being presumed to have then attained the age of discretion. Co. Litt. 247. An infant

Idiocy, or lunacy—an excuse for crime, whether existing before the act done, or occurring after it. Where the question of sanity is doubtful, the jury shall try it. A lunatic is answerable for acts done in lucid intervals. A lunatic, acquitted of felony on the ground of insanity, shall not be at large.

II. The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.* in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that “*furiosus furore solum punitur* (k).” In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself (l) (2). Also, if a man in his sound memory commits a capital offence, and, before arraignment for it, he becomes mad, he ought not to be

(k) [The madman shall be punished only by his madness.” So dreadful a calamity, as the loss of reason, is a sufficient punishment for

any offence committed under the influence of madness.—ED.]

(l) 3 Inst. 6.

above the age of fourteen may be outlawed; but, if he be under that age, the proceedings cannot be supported. 2 Dyer, 104; 2 Hale, 207-8, Williams, J. Outlawry; Chitty’s Burns, J. Process; though, in the latter case, the outlawry is not absolutely void, but must be reversed by writ of Error. 3 Dyer, 239; 2 Rol. Abr. 805; Williams, J. Outlawry.

A commission of bankrupt, which is in its nature a criminal proceeding, (in some of the statutes a bankrupt is considered a *criminal*. *Cobb v. Symonds*, 5 B. & A. 516; 1 D. & R. 111,) cannot be supported against an *infant*. In *Rex v. Cole*, 1 Lord Ray. 443.; S. C. 12 Mod. 243; Holt, 360; 1 Trem. Entr. 1981, the defendant was indicted for that he, being a bankrupt, and brought before the commissioners, &c. refused to give an account of his effects, &c. The defence at the trial, upon Not Guilty pleaded, was, that he was an infant at the time of the debts being contracted, and therefore could not be a bankrupt. And of this opinion was Holt, C. J. For (by him) though the debts of an infant are only voidable by him at his election, yet no man can be a bankrupt for debts which he is not obliged to pay. And the defendant therefore

was acquitted. And see *ex-parte Sydebotham*, 1 Atkins, 146; *ex-parte Meymott*, 1 Atkins, 197; *ex-parte Moule*, 14 Vesey, 603; *ex-parte Adam*, 1 Vesey & B. 494; *Stevens v. Jackson*, 4 Camp. 164.

(2) A lunatic, it seems, may be a bankrupt, Anon. 13 Vesey, 590; provided, the act of bankruptcy be committed during a lucid interval, *ex-parte Priddy*, Cooke’s B. L. 48; a proviso which does not appear very satisfactory; for, as the liability to the commission arises out of the capacity to contract debts, the proviso should, it is presumed, extend to the debts being contracted during lucid intervals, when the party has the capacity to contract; which a lunatic has not, at least, except for *necessaries*. *Bagster v. Lord Portsmouth*, 7 D. & R. 614; 5 B. & C. 170; 2 C. & P. 178.

An idiot, or person born deaf and dumb, or any one who is *non compos* at the time, cannot be an approver. H. P. C. 282, s. 5, v. 2. But if he who wants discretion commit a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage. *Id.* v. 1 & 3, s. 5; 3 Bac. Abr. 131. So he who invites a madman to commit murder, or other crime,

arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged *some-
 thing in stay of judgment or execution^(m) (3). Indeed, in the bloody reign of Henry the Eighth, a statute was made⁽ⁿ⁾, which enacted, that if a person, being *compos mentis*, should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 and 2 Ph. and M. c. 10. For, as

[*25]

^(m) 1 Hal. P. C. 34.⁽ⁿ⁾ 33 Hen. VIII. c. 20.

is a principal offender, and as much punishable as if he had done it himself. Id. 4, s. 7; 1 Hale, 647.

The question of insanity in a prisoner is a question for the jury, and ought to be clearly made out, in order to exempt the party from punishment. *Rex v. Arnold*, 1 Russ. 9.

To justify the acquittal of a prisoner indicted for murder, on the ground of insanity, the jury must be satisfied that he was incapable of judging between right and wrong; and that, at the time of committing the act, he did not consider that it was an offence against the laws of God and nature. *Rex v. Offord*, 5 C. & P. 168.

If, on a trial, the defence is insanity, a witness of medical skill may be asked whether such and such appearances, proved by other witnesses, are in his judgment symptoms of insanity. *Rex v. Wright*, R. & R. C. C. 456.

But query, whether he can be asked whether, from other testimony given, the act with which the prisoner is charged is, in his opinion, an act of

insanity; which is the very point to be decided by the jury. Ib.

Where a prisoner's defence is insanity, a medical man who has heard the trial may be asked whether the facts proved shew symptoms of insanity. *Rex v. Searle*, 2 M. & M. 75.

(3) The 39 & 40 Geo. III. c. 94, s. 1, enacts, that the jury in the case of any person charged with treason, &c., proving upon the trial to be insane, shall declare whether he was acquitted by them on the ground of insanity, and if so, the court shall order him to be detained in custody until His Majesty's pleasure be known, and His Majesty may give an order for the safe custody of such person; and sec. 2, enacts, That insane persons, indicted for any offence, and found to be insane by a jury, to be empanelled on their arraignment, shall be ordered by the court to be kept in custody till his Majesty's pleasure be known. The latter section has been held to extend to cases of misdemeanor. *Rex v. Little*, R. & R. C. C. 430.

is observed by Sir Edward Coke (*o*), "the execution of an offender is for example, *ut pœna ad paucos, metus ad omnes perveniat* (*p*); but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others." But if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury. And if he be so found, a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under such deprivation of the senses; but, if a lunatic hath lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency (*q*). Yet, in the case of absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subjects. It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses (*r*), without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts (*s*), a method is chalked out for imprisoning, chaining, and sending them to their proper homes (4).

(*o*) 3 Inst. 6.

(*p*) [That few may be punished, and that a fear of punishment may operate on all.—ED.]

(*q*) 1 Hal. P. C. 31.

(*r*) Bro. Abr. tit. corone. 101.

(*s*) 17 Geo. II. c. 5.

(4) The care and treatment of insane persons in England is now regulated by st. 2 & 3 W. 4, c. 107, which came into operation on the 11th August, 1832, to continue in force for three years, and from thence until the end of the then next session of parliament.

Sec. 2. Contains general rules for the interpretation of certain words used in and for construing the act.

By sec. 3. Commissioners are to be appointed on the 1st September in every year, with jurisdiction within the cities of London and Westminster, and within seven miles thereof, and within the county of Middlesex, to grant li-

censes to keep houses for the reception of two or more insane persons.

By secs. 10 & 11. In all other parts of England justices of the peace, in general or quarter sessions assembled, shall have the like authority for granting such licenses in their respective counties; and shall, at the Michaelmas general quarter sessions, appoint three or more justices, and one or more physician, surgeon, or apothecary, as visitors for each house.

By sec. 15. Fourteen clear days' notice shall be given of intention to apply for a license, and shall be accompanied by a plan of the house on a scale of not

III. Thirdly; as to artificial, voluntarily contracted madness, by *drunkenness* or intoxication, which, depriving men

Intoxication, being itself a crime, is not an

less than one-eighth of an inch to a foot, with a description of the situation, length, breadth, and height of, and a reference by a figure or letter to every room, and of the greatest number of patients to be received; and, by sec. 16, detached buildings belonging or in anywise appertaining to the house shall be considered part thereof.

By sec. 17. Notice of any additions or alterations shall be given to the clerk of the commissioners or of the peace, as the case may be, within one calendar month after the completion thereof, with such plan as aforesaid; "and if any person shall (wilfully and with intention to deceive) not give a full and complete plan of the whole house to be licensed, or notice of any and all such additions and alterations as shall have been made, he shall be deemed guilty of a misdemeanor." By sec. 22, all plans heretofore delivered shall be deemed sufficient, if the commissioners or justices shall so think.

By the same section, "it shall not be lawful for any person to keep a house for the reception of two or more insane persons, unless the same shall have been first duly licensed in the manner directed by this act; and every person keeping a house for the reception of two or more insane persons, not duly licensed, shall be deemed guilty of a misdemeanor."

Sec. 27 enacts, "That no person (not being a parish pauper) shall be received into any house licensed for the reception of insane persons in that part of the united kingdom called England, without an order under the hand of the person by whose direction such insane person is sent, which order shall be according to the form in Schedule (B.) annexed to this act; and in it shall be stated the christian and surname, and place of abode, and the degree of relationship or other circumstance of con-

nection between such person and the insane person, and the true name, age, place of residence, former occupation, and the asylum or other place (if any) in which the insane person shall have been previously confined, and whether such person shall have been found lunatic or of unsound mind under a commission issued for that purpose by the Lord Chancellor or other the person or persons intrusted as aforesaid; nor shall any such person be received into any such house without a medical certificate of two physicians, surgeons, or apothecaries, in the manner directed by this act; and if any person shall knowingly and wilfully receive any insane person, or person represented or alleged to be insane, to be taken care of or confined in any house licensed under this act, without such order and medical certificate, and without making, within three clear days after the reception of such patient, a minute or entry in writing, in a book to be kept for that purpose, according to the form in Schedule (M.) annexed to this act, of the true name of the patient, and also the christian and surname, occupation, and place of abode of the person by whom such patient shall be brought, every person so offending shall be deemed guilty of a misdemeanor."

Sec. 28 enacts, "That every medical certificate upon which any order shall be given for the confinement of any person (not a parish pauper), in a house licensed under this act, shall be according to the form in Schedule (C.) annexed to this act, and shall be signed by two medical practitioners, not being in partnership, and each of them being a physician, surgeon, or apothecary, who shall have separately visited and personally examined the patient to whom it relates not more than seven clear days previous to such confinement, and such certificate shall be

excuse, but an
aggravation of
crime.

[*26]

of their reason, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offence, rather *than

signed and dated on the day on which he or she shall have been so examined, and shall state that such person is insane and proper to be confined; and every such certificate for the confinement of any person in a house licensed under this act shall, if the same be not signed by two medical practitioners, state the special circumstance which shall have prevented the patient being visited by two medical practitioners; and any patient may under such special circumstance be admitted into any such house upon the certificate of one medical practitioner, provided such certificate shall be further signed by some other medical practitioner within seven days next after the admission of such patient into any such house as aforesaid; and any person who shall, knowingly and with intention to deceive, sign any such medical certificate untruly setting forth any of the particulars required by this act, shall be deemed guilty of a misdemeanor: Provided always, That no physician, surgeon, or apothecary shall sign any certificate of admission of a patient to any licensed house who is wholly or partly the proprietor or the regular professional attendant of such licensed house, nor shall any physician, surgeon, or apothecary sign any certificate for the reception of a patient into any such house, of which his father, son, brother, or partner is wholly or in part proprietor or the regular professional attendant, on pain of being deemed guilty of a misdemeanor."

Sec. 29 enacts, "That no parish pauper shall be received into any house licensed for the reception of insane persons without an order according to the form in Schedule (D.) annexed to this act, under the hand and seal of one justice of the peace, or an order according to the form in Schedule (E.) annexed to this act, signed by the offi-

ciating clergyman and one of the overseers of the poor of the parish to which such pauper shall belong, and also a medical certificate according to the form in Schedule (F.) annexed to this act, signed by one physician, surgeon, or apothecary, that such parish pauper is insane, and a proper person to be confined; and if any person shall knowingly and wilfully receive any parish pauper represented or alleged to be insane into any licensed house, without such order and medical certificate, every person so offending shall be deemed guilty of a misdemeanor."

Sec. 31 enacts, "That whenever any patient confined in any house licensed for the reception of insane persons shall be removed therefrom, or shall die, the proprietor or resident superintendant of such house shall, within two clear days next after such removal or death, transmit a written notice thereof to the clerk of the metropolitan commissioners or clerk of the peace, according to the form in Schedule (H.) annexed to this act; and in cases of removal such notice shall state by whom removed, and in what state of mind such person shall have been when removed, and (if within his knowledge) to what place removed; which notices shall in like manner be preserved and entered by the clerk of the commissioners or clerk of the peace as is required in the case of the notice of the admission of any patient into such licensed house; and every proprietor or resident superintendant of any such house, who shall knowingly and wilfully neglect so to do, shall be deemed guilty of a misdemeanor."

By sec. 35, houses are to be inspected by the commissioners four times in the year at least. And by sec. 36, the visitors appointed at the quarter sessions shall visit houses three times a year at least; and upon this

as an excuse for any criminal misbehaviour. A drunkard, says Sir Edward Coke (*t*), who is *voluntarius dæmon*, hath

(*t*) Inst. 247.

subject, sec. 40 enacts, "That if the proprietor or resident superintendant of any licensed house shall fraudulently conceal or attempt to conceal any part of such house or premises, or any person detained therein as insane, from any such commissioners or visitors, or from any medical or other person authorized under the provisions of this act to visit and inspect any such house and the patients confined therein, every person so offending shall be deemed guilty of a misdemeanor."

Sec. 46 enacts, "That no person (except he be a guardian or relative who does not derive any profit from the charge, or a committee appointed by the Lord Chancellor or other the person or persons intrusted as aforesaid,) shall, under pain of being deemed guilty of a misdemeanor, receive to board or lodge in any house not licensed under this act, or take the care or charge of any insane person, without first having the like order and medical certificates as are required on the admission of an insane person (not being a parish pauper patient) into a licensed house."

Sec. 47 enacts, "That every person (except as aforesaid) who shall receive to board or lodge in any house not licensed under this act, or take the care or charge of any insane male or female person, shall within twelve calendar months next after, if such insane persons respectively shall not previously have returned to their own or usual place of abode, transmit to the clerk of the metropolitan commissioners a copy of such order and medical certificates, sealed, and indorsed 'Private Return,' and not to be inspected by any person except by the said clerk or other person authorized by the Lord Chancellor or his Majesty's Secretary of State for

the Home Department; and every such person (except as aforesaid) shall also (if such insane male or female person shall not have been removed) on the first day of January in every succeeding year, or within seven clear days after, transmit to such clerk a certificate signed by two physicians, surgeons, or apothecaries, describing the then actual state of mind of such insane person, and to be indorsed 'Private Return;' and all such orders, medical certificates, and return, shall be preserved by the said clerk, and shall be open only to the inspection of his Majesty's principal Secretary of State for the Home Department, and of the Lord High Chancellor or other the person or persons intrusted as aforesaid, and of such other persons as shall be authorized to inspect the same by an order under their respective hands and seals; and every person (except as aforesaid) who shall receive to board or lodge in any house not licensed under this act, or take the care or charge of any insane person in any such house, and who shall omit to transmit such copies of orders and certificates, shall be deemed guilty of a misdemeanor; and the clerk of the metropolitan commissioners in lunacy, with the sanction in writing of his Majesty's Principal Secretary of State for the Home Department, is hereby required to enforce the due execution of this provision of law; and he shall be paid or allowed such a sum of money for any proceedings thereabout as his Majesty's Principal Secretary of State for the Home Department shall think fit, and to be charged upon the contingency fund of the Home Office."

Sec. 55, reciting 'and whereas it is not intended by this act to give the proprietors or resident superintendant of any licensed house, or any other person

no privilege thereby; but what hurt or ill soever he doth his drunkenness doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit* (v). It hath been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of the climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German therefore, says the president Montesquieu (u), drinks through custom, founded upon constitutional necessity; a Spaniard drinks through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warmer climate of Greece, a law of Pittacus enacted, "that he who committed a crime, when drunk, should receive a double punishment; one for the crime itself, and the other for the ebriety which prompted him to commit it (w)." The Roman law indeed made great allowances for this vice: "*per vinum delapsis capitalis pœna remittitur* (x)." But the law of

(v) [For drunkenness incites, and at the same time detects every crime.—ED.]

(u) Sp. L. b. 14, c. 10.

(w) Puff. L. of N. b. 8, c. 3.

(x) Ff. 49, 16, 6. [Capital punishment is not inflicted upon those who are prompted to crime by drunkenness.—ED.]

concerned in confining any of his Majesty's subjects, any new justification from their being able to prove that the person so confined has been sent there by such order and upon such medical certificates as are required by this act; enacts, "That in all proceedings which shall be had under his Majesty's writ of *habeas corpus*, and in all indictments, informations, and actions, and other proceedings that shall be preferred or brought against any person for confining or ill-treating any of his Majesty's subjects, insane, or represented or alleged to be insane, the parties complained of shall be obliged to justify their proceedings according to the course of the common law, in the same manner as if this act had not been made."

Sec. 59 enacts, "That it shall not

be lawful for any person whomsoever to commence, prosecute, enter, file, or prefer any action, bill, plaint, information, or indictment, against any person, under or by virtue of this act, unless the same be commenced, prosecuted, entered, filed, or preferred, by order of the said metropolitan commissioners at some one of their meetings, or by the justices at their general quarter sessions, within their respective jurisdictions, or as is otherwise directed by this act."

And by sec. 61, "every offence under this act (except such as are committed within the jurisdiction of the metropolitan commissioners, or such as are punishable by summary conviction), shall be by indictment preferred to a grand jury at the assizes to be held in and for the county where the offence shall have been committed."

England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, (though real,) will not suffer any man thus to privilege one crime by another (*y*) (5).

IV. A fourth deficiency of will, is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief *happens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour (*z*) (6).

Misfortune an excuse for mischief consequent from a lawful act: otherwise, from an unlawful act.

[*27]

V. Fifthly, *ignorance*, or *mistake*, is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act. But this must be an

Ignorance of fact an excuse for crime but not ignorance of law: all persons are bound, and therefore presumed to know the law.

(*y*) Plowd. 19.

(*z*) 1 Hal. P. C. 39.

(5) He who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober; 1 Hawk. c. 1, § 6. But, though voluntary drunkenness cannot excuse the commission of crime, yet where, as upon a charge of murder, the material question is whether an act was premeditated, or done only from sudden heat and impulse, the fact of the party being intoxicated has been held a circumstance proper to be taken into consideration. *Rex v. Grindley*, 1 Russ. 8. There are several Acts in being, intended for the suppression of intemperance, imposing certain penalties for the offence of drunkenness,

which are increased in a twofold ratio upon a repetition of the offence; see 34 Edw. III. c. 1; 4 Jac. I. c. 5; 21 Jac. I. c. 7; 22 Geo. II. c. 33; 2 H. P. C. 136; *post* 64.

(6) But a very important distinction is made in such cases, *viz.* whether the unlawful act is also in its original nature wrong and mischievous; for a person is not answerable for the incidental consequences of an unlawful act, which is merely a *malum prohibitum*; as where any unfortunate accident happens from an unqualified person being in pursuit of game, he is amenable only to the same extent as a man duly qualified; Fost. 259; 1 Hale, P. C. 475.—CH.

ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action (a): but, if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat* (7), is as well the maxim of our own law (b), as it was of the Roman (c).

(a) Cro. Car. 538.

(b) Plowd. 343.

(c) Ff. 22, 6, 9.

(7) "Ignorance of the law, which every man is bound to know, excuses no man." But this general rule is not without exceptions. In *Rex v. Bailey*, R. & R. C. C. 1, the prisoner was indicted for maliciously shooting; the offence was within a few weeks after the 39 Geo. III. c. 37 passed, and before notice of it could have reached the place where the offence was committed. The judges thought, that he could not have been tried, if the Act had not passed; and that, as he could not have known of the Act, he ought to be pardoned. In *Anstee v. Liley*, 1 Man. & Ry. 564, where it was urged in excuse for the defendant not having pleaded in a particular mode prescribed by an Act of Parliament, that he was ignorant of the Act at the time, it is said, page 566, note (f), "The defendant was not ignorant of the fact of the residence within the liberty, and his ignorance of the statute, which is declared (sect. 24) to be a public act, would not avail him; for *ignorantia legis neminem excusat*; *Bilbie v. Lumley*, 2 East, 471; *Williams v. Bartholomew*, 1 B. & P. 322; *Stevens v. Lynch*, 12 East, 38; *East India Company v. Tritton*, 5 D. & R. 214; 3 B. & C. 280, 290. This rule is borrowed from the civil law, (D. lib. 22, tit. 6,) without, however, adopting

with it those equitable modifications by which the rule was originally accompanied, some of which it may be proper to state. "*Juris ignorantia non prodest adquirere volentibus, suum vero petentibus non nocet*," ignorance of the law does not avail those who attempt to take to themselves the property of others, but neither does it prejudice those who seek only to recover their own; D. 22, 6, 7; or, as it is expressed by the commentators, "*Juris error, ubi de damno evitando agitur, non nocet: ubi de lucro captando, nocet: error facti neutro casu nocet*." "*Minoribus 25 annis jus ignorare permissum est: quod et in fæminis in quibusdam causis propter sexus infirmitatem dicitur; et ideo, sicubi non est delictum, sed juris ignorantia, non læduntur*:" Error in law, where it is committed in the endeavour to avoid a loss, does not prejudice; where, in the attempt improperly to acquire gain, it does. Persons under the age of twenty-five years may be supposed to be ignorant of the law; the same may, in some instances, be said of females, on account of the weakness of their sex: and, therefore, wherever they act, not from a wicked motive, but in ignorance of the law, they are excused; D., 22, 6, 9. And see Pothier, *Traite de l'Action, Condictio indebiti*, part 2,

VI. A sixth species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

Compulsion, or necessity, an excuse for crime.

*1. Of this nature, in the first place, is the obligation of *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted in *foro conscientiae*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigotted days of Queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of its merciless sister, persecution.

[*28]

Such compulsion may be by *civil subjection*; as by the legislature over the subject.

As to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband: for neither a son nor a servant are excused for the commission of any crime whether capital or otherwise, by the command or coercion of the

Or, as by the husband over the wife, with certain exceptions.

sec. 2, art. 3. In Vernon's case, Mich. 20 Hen. VII. fo. 2, pl. 4, the defendants justified taking away the plaintiff's wife, on the ground that they were accompanying her to Westminster, to sue for a divorce in ease of her conscience. It was objected to the plea, that the defendants ought to

have taken her to the ordinary or the metropolitan; but the plea was held good, "*for perhaps they had not knowledge of the law as to where the divorce should be sued.*" And see Manser's case, 2 Co. Rep. 4; Doctor and Student, book 2, cap. 46, 47; *Eichhorn v. Le Maitre*, 2 Wils. 368."

[*29]

parent or master (*d*); though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime; being considered as acting by compulsion and not of her own will (*e*) (8). Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of King *Ina the West Saxon (*f*). And it appears that, among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offence with a freeman; the male or freeman only was punished, the female or slave dismissed; "*proculdubio quod alterum libertas, alterum necessitas impelleret* (*g*).” But (besides that in our

(*d*) 1 Hawk. P. C. 3.

(*e*) 1 Hal. P. C. 45.

(*f*) Cap. 57.

(*g*) Stiernh *de jure Sucon.* l. 2, c. 4.

—From the probability that freedom actuated the one, and necessity the other.

(8) The wife is not treated as an accessory to a felony for receiving her husband who has been guilty of it, though, on the contrary, it appears the husband would be for receiving his wife; H. P. C. vol. 1, § 10, 1 Hale, 44. A wife cannot commit larceny in the presence of her husband, for it is deemed his coercion, and not her voluntary act; yet, if she do it in his absence, and by his mere command, she is then punishable as if she were sole, and the husband, it is said, may be accessory to the wife; Anon. 2 East, P. C. 559.

A wife, by her husband's order and procuration, but in his absence, knowingly uttered a forged order and certificate for the payment of prize-money; held, that the presumption of coercion did not arise, and that the wife might be convicted of uttering, and the husband of procuring; *Rex v. Morris*, R. & R. C. C. 270.

On an indictment against a married

woman for falsely swearing herself to be next of kin, and procuring administration, she may be found guilty, although her husband was present when she took the oath; *Rex v. Dicks*, 1 Russ. 16.

But she cannot be guilty of any breach of duty, in neglecting to provide her husband's apprentice with necessaries, whereby he died; for in such a case she is considered only as the servant of her husband; *Rex v. Squire*, *Ibid.*

When a crime has been completed by the wife in the absence of the husband, no subsequent act of his can be referred to what was then done; *Rex v. Hughes*, 1 Russ. 18.

Husband and wife were jointly indicted for receiving stolen goods, and were both convicted. It was held, that as the charge against both was joint, and it was not left to the jury to say whether the wife received the goods in the absence of her husband, her con-

law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives, this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like (9): not only because these are of a deeper dye; but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also, (the highest crime which a member of society can, as such, be guilty of,) no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt (*h*): as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemeanors also, we may remark another exception; that a wife may be indicted and set in the pillory *with* her husband, for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex (*i*) (10). And in all cases, where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any feme-sole.

*2. Another species of compulsion or necessity is what our

[*30]

(*h*) 1 Hal. P. C. 47.

(*i*) 1 Hawk. P. C. 2, 3.

viction was wrong; *Rex v. Archer*, R. & M. C. C. 143.

Strict evidence of the marriage need not be given: cohabitation and reputation are sufficient; *Rex v. Atkinson*, 1 Russ. 20.

But if a man and woman are jointly indicted, the latter as a single woman, it is not sufficient to entitle her to an acquittal, on the ground of coercion, to prove that both committed the offence jointly, and that she had lived with the man two years, and was reputed his

wife: evidence must be given to satisfy the jury that the prisoners were in fact married, though it is not necessary to prove the actual marriage according to the strict rules of law; *Rex v. Hassell*, 2 C. & P. 434. And see *Rex v. Knight*, 1 C. & P. 116.

(9) The law seems to protect the wife in all felonies committed by her in company with her husband, except murder and manslaughter; 1 Hal. P. C. 47.—CH.

(10) According to the prevailing

Such compulsion may be by *duress per minas*: as, by the enemy in time of rebellion.

law calls *duress per minas* (*j*); or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be just and well grounded; such, "*qui cadere possit in virum constantem, non timidum et meticulousum* (*k*)," as, Bracton expresses it (*l*), in the words of the civil law (*m*). Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace (*n*) (11). This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of Divine punishment. And therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person: this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent (*o*). But in such a case he is permitted to kill the assailant; for there the law of nature, and self-defence its primary canon, have made him his own protector.

(*j*) See vol. i. page 131.

(*l*) L. 2, f. 16.

(*k*) Such as may be supposed to actuate a man of firm mind, not a timid or weak minded man.

(*m*) Ff. 4, 2, 5, & 6.

(*n*) 1 Hal. P. C. 50.

(*o*) Ib. 51.

opinion, it seems that the wife may be found guilty *with* the husband, in *all* misdemeanors; 1 Hawk. P. C. c. 1, § 12; 10 Mod. 63.

(11) An apprehension, though ever so well grounded, of having *property* wasted or destroyed, or of suffering any other mischief not endangering the *person*, will afford no excuse for joining or continuing with rebels; *Rex v. M'Growther*, 1 East, P. C. 71: though it is otherwise if the party join from fear of death, or by compulsion; *Rex v. Gordon*, Ib.

On an indictment on 7 & 8 Geo. 4, c. 30, § 4, for breaking a thrashing machine, the judge allowed a witness to be asked whether the mob, by whom the machine was broken, did not compel persons to join them, and then compel each person to give one blow to the machine; and also whether, at the time when the prisoner and himself were compelled to join the mob, they did not agree to leave them as soon as they could; *Rex v. Crutchley*, 5 C. & P. 133.

And see Fost. 14, 216.

3. There is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the *least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive, than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity, where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public: and therefore excuse the felony, which the killing would otherwise amount to (p).

Necessity an excuse for crime; as, the killing one who would rescue a felon.

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4. There is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz. whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities? And this both Grotius (q) and Puffendorf (r), together with many other of the foreign jurists, hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods by a kind of tacit concession of society is revived. And some even of our own lawyers have held the same (s), though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present (t). And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero (v), who hold that "*suum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum* (u); but also to the Jewish law, as

Necessity of want, or hunger, no excuse for crime. This doctrine of the law of England justified on principle.

(p) 1 Hal. P. C. 53.

(v) De Off. l. 3, c. 5.

(q) De jure b. & p. l. 2, c. 2.

(u) That every man must bear his

(r) L. of Nat. & N. 1, 2, c. 6.

own losses, rather than infringe upon

(s) Britton, c. 10. Mirr. c. 4, § 16.

the privileges of another.

(t) 1 Hal. P. C. 54.

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certified by King Solomon himself (*w*): “if a thief steal to satisfy his soul when he is hungry, he shall restore *seven-fold, and shall give all the substance of his house:” which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men’s properties would be under a strange insecurity, if liable to be invaded according to the wants of others, of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible that the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by Baron Puffendorf, and whereon he builds his principal arguments: which, however they may hold upon the continent, where the parsimonious industry of the natives orders every one to work or starve, yet must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous; especially when we consider, that the king, on the representation of his ministers of justice, hath a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical: and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigour. But the founders of our constitution thought it better to vest in the crown the power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

The king is incapable of doing wrong by virtue of his prerogative.

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VII. To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, we may add one more, in which the law supposes an incapacity of doing wrong, from the excellence and perfection of the *person; which extend as well to the will as to the other qualities of his mind. I mean the case of the king; who,

(*w*) Prov. vi. 30.

by virtue of his royal prerogative, is not under the coercive power of the law (*x*); which will not suppose him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the consequence if the king were to act thus and thus: since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do any thing inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance. But of this sufficient was said in a former volume (*y*), to which I must refer the reader.

(*x*) 1 Hal. P. C. 44.

(*y*) Book I. ch. 7, page 244.

CHAPTER III.

OF PRINCIPALS AND ACCESSARIES.

The degrees of
guilt in crimi-
nals. 1. As
principals. 2.
As accessaries.

It having been shewn in the preceding chapter what persons are, or are not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending; *viz.* as *principal*, and as *accessary*.

Principals are
of two degrees.
1. He who
commits the act.
2. He who is
present aiding
in the commis-
sion of it. Such
presence may be
actual or con-
structive.

I. A man may be *principal* in an offence in two degrees. A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree, he is who is present, aiding, and abetting the fact to be done (*a*) (1). Which *presence* need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance (*b*). And this rule hath also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or persuading another to drink it (*c*) who is ignorant of its poisonous quality (*d*), or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed (*e*) (2). And the same reasoning will hold, with regard to other mur-

(*a*) 1 Hal. P. C. 615.

(*b*) Foster, 350.

(*c*) Kel. 52.

(*d*) Foster, 349.

(*e*) 3 Inst. 138.

(1) But, if a person be actually present, and aiding and abetting, he cannot be indicted as an accessary; 1 Leach, 515; 3 P. W. 476; 1 Chit. C. L. 262; 2 Hawk. P. C. 438.

(2) If one hire another to lay poison in order to kill a third, and he take it and die, the party hired is

guilty, though absent, as principal, and the contriver as accessary; but, if the latter were present at the laying or disposing of the poison, both would be principals; 1 Hale, 616; Com. Dig. Justices T. 1; 1 Chit. C. L. 262. A person waiting outside of a house to receive goods, which a con-

ders committed in the absence *of the murderer, by means which he had prepared beforehand, and which probably

federate is stealing in the house, is a principal; *Rex v. Owen*, 1 R. & M. C. C. 96. If several are concerned in privately stealing in a shop, some in the shop, and some out, and the property is stolen by those in the shop, all are guilty as principals; *Rex v. Gogerley*, R. & R. C. C. 343. If several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of such goods, and another of them entices him away, that the man who has his goods may carry them off, all are guilty as principals; *Rex v. Standley*, Id. 305. All persons aiding and abetting the personating a seaman to obtain his prize money, are principals; *Rex v. Potts*, Id. 353. If several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are nevertheless all guilty as principals; *Rex v. Bingley*, Id. 446. If several persons go to a house with intent to make an affray, and one is killed while the others are illegally engaged in different rooms, all are principals in the murder; Dalton, chap. 161; 1 Hale, P. C. 439. Where the servants of A. feloniously removed goods in his warehouse from one part of it to another, and afterwards B. assisted in removing the goods from the warehouse, it was held that B. was a principal, 2 East, P. C. 767. But, if several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a person to avoid being taken, the others are not to be considered principals in such act; *Rex v. White*, R. & R. C. C. 99. So it was held not to be sufficient to make a person a principal in uttering a forged note that he came with the utterer to the town where it was uttered, went out with

him from the inn at which they had put up a little before he uttered it, joined him again in the street a short time after the uttering, and at some little distance from the place of uttering, and ran away when the utterer was apprehended; *Rex v. Davis*, Id. 113. So, if several plan the uttering of a forged order for payment of money, and it is uttered accordingly by one in the absence of the others, the actual utterer is the only principal; *Rex v. Badcock*, Id. 249. So where A. and B. in the absence of C. broke open a warehouse, and stole therefrom several articles, which they conveyed some distance from the warehouse door, and then fetched C., who had previous knowledge of the robbery, and he assisted in removing the goods to a cart which was in preparation to take them off, the judges were of opinion, that, as the property was carried from the premises before C. was present, he could only be deemed an accessory; *Rex v. King*, Id. 332. So persons privy to the uttering of a forged note by previous concert with the utterer, but who were not present at the time of uttering, or so near as to be able to afford any assistance, were held not to be principals; *Rex v. Loares*, Id. 25; 2 East, P. C. 974; *Rex v. Stewart*, R & R. C. C. 363. And in a late extraordinary case, the following points were decided. If a man encourage another to murder himself, and is present abetting him while he does so, he is guilty of murder as a principal. If two encourage each other to murder themselves together, and one does so, but the other fails in the attempt to do so, he is a principal in the murder of the other. But, if it is uncertain, whether the deceased really killed himself, or whether he came to his death by accident, before the moment when he meant to destroy himself, it is not murder in either; *Rex v. Dyson*, Id. 523.

could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief; or exciting a madman to commit murder, so that death thereupon ensues: in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily presupposing a principal: and the poison, the pitfall, the beast, or the madman, cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal: and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist (*f*).

Accessaries are of two kinds before the fact, and after it, but neither present at the commission of it.

II. An *accessary* is he who is not the chief actor in the offence, nor present at its performance, but is someway concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will first examine what offences admit of accessaries, and what not: secondly, who may be an accessory *before* the fact: thirdly, who may be an accessory *after* it: and, lastly, how accessaries, considered merely as such, and distinct from principals, are to be treated.

The offences admitting of accessaries are petit treason and felony; in high treason and misdemeanors there cannot be accessaries.

I. And, first, as to what offences admit of accessaries, and what not. In high treason there are no accessaries, but all are principals: the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime (*g*). Besides it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessaries before the fact: since the *very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make

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(*f*) 1 Hal. P. C. 617; 2 Hawk. P. C. 315.

(*g*) 3 Inst. 138; 1 Hal. P. C. 136.

a man a principal traitor (*h*). In petit treason, murder, and felonies with or without benefit of clergy (3), there may be accessaries: except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessaries *before* the fact (*i*). So too in petit larceny, and in all crimes under the degree of felony, there are no accessaries either *before* or *after* the fact; but all persons concerned therein, if guilty at all, are principals (*k*): the same rule holding with regard to the highest and lowest offences; though upon different reasons. In treason all are principals, *propter odium delicti*; in trespass all are principals, because the law, *quæ de minimis non curat*, does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim, that *accessorius sequitur naturam sui principalis* (*l*): and therefore an accessory cannot be guilty of a higher crime than his principal, being only punished as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though, had he been present and assisting, he would have been guilty as principal of petty treason, and the stranger of murder (*m*).

2. As to the second point, who may be an accessory *before* the fact; Sir Mathew Hale (*n*) defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal. If A. then advises B. to kill another, and *B. does it in the absence of A., now B. is principal, and A. is accessory in the murder. And this holds, even though the party killed be not *in rerum naturâ* at the time of the advice given. As if A., the reputed father, advises B.

An accessory before the fact is one who is absent when the crime is committed, but who has in some degree procured the commission of it.

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(*h*) Foster, 342.

(*i*) 1 Hal. P. C. 615.

(*k*) Ibid. 613.

(*l*) 3 Inst. 139. The guilt of the

accessary follows the nature of that of the principal.

(*m*) 2 Hawk. P. C. 315.

(*n*) 1 Hal. P. C. 615, 616.

(3) This seems to apply merely to felonies, where, by the law, judgment of death ought regularly to ensue,

1 Hale, 618; 1 Burn, 5. The crime of petit treason is now abolished. See *ante*, 16, note (10).

the mother of a bastard child, unborn, to strangle it when born, and she does so, A. is accessory to this murder (*o*). And it is also settled (*p*), that whoever procureth a felony to be committed, though it be by the intervention of a third person (4), is an accessory before the fact. It is likewise a rule, that he who in anywise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A. commands B. to beat C., and B. beats him so that he dies, B. is guilty of murder as principal, and A. as accessory (5). But if A. commands B. to burn C.'s house; and he, in so doing, commits a robbery; now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and un consequential nature (*q*) (6). But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies; the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance (*r*).

An accessory after the fact is one who knows the crime to have been committed, and afterwards protects or assists the criminal.

3. An accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon (*s*). Therefore, to make an accessory *ex post facto*, it is in the first place requisite that

(*o*) Dyer, 186.

(*p*) Foster, 125.

(*q*) 1 Hal. P. C. 617.

(*r*) 2 Hawk. P. C. 316.

(*s*) 1 Hal. P. C. 618.

(4) Without any personal communication, even with the principal. 2 Hawk. P. C. 440.

(5) This must be understood to have reference to a case where the command is to beat violently. 1 Hale, 442, 3 & 4; 1 East, P. C. 257, 8 & 9; Kel. 109, 117.

(6) The crime must be of the same complexion, and not on a different object than that to which the agent was instigated. Thus if A. commands B. to burn a certain house with which he

is well acquainted, and he burns another, or to steal a certain horse, and he steals a different one, A. will not be liable to be indicted as accessory to the crimes committed, because B. acting in contradiction to the commands of A., and that knowingly, it is on his part a mere ineffectual temptation, and the specific crime he planned was never completed; Plowd. 475; Hawk. B. 2, c. 29, s. 18; 1 Hale, 617; Com. Dig. Justices, T. 1; Fost. 360. A person indicted as an

he knows of the felony committed (*t*) (7). In the next place, he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his *pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him (*v*). So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessities, is no offence: for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law (*u*). To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions; it was therefore at common law a mere misdemeanour, and made not the receiver accessory to the theft, because he received the *goods* only, and not the *felon* (*w*): but now by the statutes 5 Ann. c. 31, and 4 Geo. I. c. 11, (8), all such receivers are made accessaries (where the principal felony admits of accessaries) (*x*),

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(*t*) 2 Hawk. P. C. 319.(*w*) 1 Hal. P. C. 620.(*v*) 2 Hawk. P. C. 317, 318.(*x*) [Foster, 73.—Ed.](*u*) 1 Hal. P. C. 620, 621.

accessary before the fact, cannot be convicted of that charge upon evidence shewing him to have been present, aiding and abetting; *Rex v. Gordon*, 1 Leach, 515; 1 East, P. C. 352. It is not essential that there should have been any direct communication between an accessory before the fact and the principal felon. It is enough if the accessory direct an intermediate agent to procure another to commit the felony; even if the accessory does not name the person to be procured, but merely directs the agent to procure some person; *Rex v. Cooper*, 5 C. & P. 535.

(7) He must know that the felon is guilty; and it seems to be the better opinion, that an implied notice is not sufficient; 1 Hale, 323 & 622 A., a

lad, who was a clerk in a banking-house, robbed his employers. After doing so he went to the lodgings of B., who was much older than himself, and who had relations in America. A. stayed twenty minutes at B.'s lodgings, and after that, on the same night, A. and B. started together by the coach, and went from Reading to Liverpool, intending to embark for America. Held that, upon this evidence, B. might be convicted as an accessory after the fact, in harbouring, receiving, and maintaining A., the principal felon; *Rex v. Lee*, 6 C. & P. 536.

(8) 5 Ann. c. 31, is repealed by 7 Geo. IV. c. 31, as relating to this subject, and 4 Geo. I. c. 11, as to this offence, is repealed by 7 & 8 Geo. IV. c. 27; and now by 7 & 8 Geo. IV.

and may be transported for fourteen years; and, in the case of receiving linen goods stolen from the bleaching grounds, are by statute 18 Geo. II. c. 27, declared felons without benefit of clergy (9). In France such receivers are punished with death: and the Gothic constitutions distinguished also three sorts of thieves, "*unum qui consilium daret, alterum qui contrectaret, tertium qui receptaret et occuleret: pari pœnæ singulos obnoxios* (x) (10)."

Where a felony is complete, a parent, child, brother, master, servant, or husband, may be an accessory after the fact; but not a wife.

The felony must be complete at the time of the assistance given; else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide; for, till death ensues, there is no felony committed (y). But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child his parent, if the brother receives his brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a *felony, the receivers become accessories *ex post facto* (z). But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord (a) (11).

[*39]

(x) Stiernhook, de jure Goth. l. 3, c. 5.

(y) 2 Hawk. P. C. 320.

(z) 3 Inst. 108. 2 Hawk. P. C. 320.

(a) 1 Hal. P. C. 621.

c. 29, such receivers may be indicted as accessories after the fact, or for a substantive felony; and in the latter case, whether the principal shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and are liable to transportation or imprisonment.

(9) The 1st sec. of 18 Geo. II. c. 27, which excluded such offenders from benefit of clergy, was repealed by 51 Geo. III. c. 41, which, in its turn, has been repealed by 7 & 8 Geo. IV. c. 27; and now, by 7 & 8 Geo. IV. c. 29, s.

16, this offence is punishable by transportation for life, or for any term not less than seven years, or by imprisonment not exceeding four years, with public or private whippings for male offenders.

(10) "One who counsels the thief; another who is concerned in the theft; and a third who receives and conceals the thief or the stolen property: all are liable to the same punishment."

(11) But if the wife alone, the husband being ignorant of it, do receive any other person, being a felon, the

4. The last point of inquiry is, how accessaries are to be treated, considered distinct from principals. And the general rule of the ancient law, borrowed from the Gothic constitutions (*b*), is this, that accessaries shall suffer the same punishment as their principals: if one be liable to death, the other is also liable (*c*); as, by the laws of Athens, delinquents and their abettors were to receive the same punishment (*d*). Why then, it may be asked, are such elaborate distinctions made between accessaries and principals, if both are to suffer the same punishment? For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2. Because, though by the ancient common law the rule is, as before laid down, that both shall be punished alike; yet, now by the statutes relating to the benefit of clergy, a distinction is made between them; accessaries *after* the fact being still allowed the benefit of clergy in all cases, except horse-stealing (*e*) and stealing of linen from bleaching grounds (*f*) (12); which is denied to the principals, and accessaries

Distinction in the punishment of principals and accessaries founded in reason. It does not apply to accessaries *before* the fact.

(*b*) See Stiernhook, *ibid*.

(*c*) 3 Inst. 188.

(*d*) Pott. Antiq. b. 1, c. 26.

(*e*) Stat. 31 Eliz. c. 12.

(*f*) Stat. 18 Geo. II. c. 27.

wife is accessory, and not the husband. 1 H. H. 621. But if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. *Ibid*.

(12) See *ante* 38 *in notis*.

By st. 9 Geo. IV. c. 31, accessaries before the fact in cases of murder, are rendered equally guilty with the principal.

By st. 7 & 8 Geo. IV. c. 29, intituled "An Act for consolidating and amending the Laws in England relating to Larceny and other Offences connected therewith," it is enacted, in the 61st section, "That in every case of felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be

punishable with death, or otherwise, in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act, (except only a receiver of stolen property,) shall on conviction be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this Act, shall be liable to be indicted and punished as a principal offender."

And by 7 & 8 Geo. IV. c. 30, intituled "An Act for consolidating and amending the Laws in England relative to Malicious Injuries to Property," a similar enactment is made in § 26 to the above.

[*40]

before the fact, in many cases; as among others, in petit treason, murder, robbery, and wilful burning (*g*). And perhaps if a distinction were constantly to be made between the punishment of principals and accessaries, even *before* the fact, the latter to be treated with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as the danger would *be greater than that of his accomplices, by reason of the difference of his punishment (*h*).

3. Because formerly no man could be tried as accessory, till after the principal was convicted, or at least he must have been tried at the same time with him; though that law is now much altered, as will be shewn more fully in its proper place.

4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counselling a felon is no acquittal of the felony itself: but it is matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory *before* the fact; since those offences are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also (*i*). But it is clearly held, that one acquitted as principal may be indicted as an accessory *after* the fact; since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary; though the punishment is still much the same with regard to principals, and such accessaries as offend *before* the fact is committed. (13).

(*g*) 1 Hal. P. C. 615.(*h*) Beccar. c. 37.(*i*) 1 Hal. P. C. 625, 626; 2 Hawk.

P. C. 373; Foster, 361.

As these three Acts incorporate nearly every offence of murder, felony, and misdemeanor mentioned and adverted to by the learned Commentator, it is deemed prudent to subjoin an abstract of them in this chapter as far as they respectively relate to the distinctive punishments against principals in the second degree, accessaries before

the fact, accessaries after the fact, and aiders or counsellors in misdemeanors, that the reader may carry them with him in his subsequent stages through the volume.

(13) By 7 Geo. IV. c. 64, § 10, if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by

virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason whereof such person shall have become an accessory had been committed at the same place as the principal felony, although such act may have been committed either on the high seas, or at any place on land, whether within his Majesty's dominions or without; and in case the principal fe-

lony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offence of such accessory may be inquired of, tried, determined, and punished in either of such counties: Provided always, That no person who shall be once duly tried for any offence of being an accessory, shall be liable to be again indicted or tried for the same offence. And see *post*, 132.

CHAPTER IV.

OF OFFENCES AGAINST GOD AND RELIGION.

Some acts, criminal *per se*, are not punishable as crimes by law, as private drunkenness or lying.

[*42]

IN the present chapter we are to enter upon the detail of the several species of crimes and misdemeanors, with the punishments annexed to each by the laws of England. It was observed in the beginning of this book (*a*), that crimes and misdemeanors are a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in its social aggregate capacity. And in the very entrance of these Commentaries (*b*) it was shewn, that human laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society (*c*): and, of consequence, private vices, or breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law; any further than as, by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowledge and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, its evil example makes it liable to temporal censures. The vice of lying, which consists, abstractedly taken, in a criminal violation of truth, and therefore in any *shape is derogatory from sound morality, is not, however, taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompence is given. And yet drunkenness and malevolent lying are *in foro conscientiae* as thoroughly criminal

(*a*) See p. 5.

(*b*) See vol. I., p. 123, 124.

(*c*) Beccar, ch. 8.

when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are subject to the vengeance of eternal justice; and public vices are besides liable to the temporal punishments of human tribunals.

On the other hand, there are some misdemeanors, which are punished by the municipal law, that have in themselves nothing criminal, but are made unlawful by the positive constitutions of the state, for public convenience. Such as poaching, exportation of wool, and the like. These are naturally no offences at all; but their whole criminality consists in their disobedience to the supreme power, which has an undoubted right, for the well-being and peace of the community, to make some things unlawful, which are in themselves indifferent. Upon the whole, therefore, though part of the offences to be enumerated in the following sheets are offences against the revealed law of God, others against the law of nature, and some are offences against neither; yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man.

Some acts punishable as crimes by law, are not criminal *per se*; as poaching.

Having premised this caution, I shall next proceed to distribute the several offences, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the king and his government; fourthly, such as more directly *infringe the rights of the public or commonwealth; and, lastly, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

Crimes and misdemeanors punishable by law, are such as offend against, 1, God and religion. 2, The law of nations. 3, The king and his government. 4, The commonwealth. 5, Individuals.

[*43]

First then, of such crimes and misdemeanors as more immediately offend Almighty God, by openly transgressing the precepts of religion either natural or revealed; and mediately, by their bad example and consequence, the law of society also; which constitutes that guilt in the action, which human tribunals are to censure.

Offences against God and religion transgress the law of society also.

I. Of this species the first is that of *apostacy*, or a total renunciation of christianity, by embracing either a false religion, or no religion at all. This offence can only take place

Apostacy is an offence against God and religion. Its definition, history, mischief, and punishment.

in such as have once professed the true religion. The perversion of a christian to judaism, paganism, or other false religion, was punished by the Emperors Constantius and Julian with confiscation of goods (*d*); to which the Emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity (*e*). A punishment too severe for any temporal laws to inflict upon any spiritual offence: and yet the zeal of our ancestors imported it into this country; for we find by Bracton (*f*), that in his time apostates were to be burnt to death. Doubtless the preservation of christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the supreme being, and a firm persuasion that he superintends and will finally compensate every action in human life, all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our Saviour Christ, these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting: all moral evidence *therefore, all confidence in human veracity must be weakened by apostacy, and overthrown by total infidelity (*g*). Wherefore all affronts to christianity, or endeavours to depreciate its efficacy, in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offence, taken in a civil light, deserves: and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostacy was for a long time the object only of the ecclesias-

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(*d*) Cod. l. 7, 1.

(*e*) Ibid. 6.

(*f*) L. 3, c. 9.

(*g*) *Utiles esse opiniones has, quis negat, cum intelligat, quam multa firmentur jure-jurando; quantæ salutis sint fœderum religiones; quam multos divini supplicii metus a scelere revocavit; quamque sancta sit societas civium inter ipsos, Diis immortalibus interpositis tum judicibus tum testibus? Cic de*

LL. ii. 7. Who will deny the utility of these opinions, when he considers how many things are established by an oath; what benefit arises from the religious obligations of treaties; how many are deterred from crime by the fear of divine punishment; and how sanctified the intercourse of men will become, when the gods are interposed as the judges and as the witnesses of their conduct.

tical courts, which corrected the offender *pro salute animæ*. But about the close of the last century, the civil liberties to which we were then restored being used as a cloak of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was thought necessary again for the civil power to interpose, by not admitting those miscreants (*h*) to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 and 10 W. III. c. 32, that if any person educated in, or having made profession of, the christian religion, shall, by writing, printing, teaching, or advised speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail. To give room, however, for repentance, if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities (1).

II. A second offence is that of *heresy*, which consists not in a total denial of christianity, but of some of its essential *doctrines, publicly and obstinately avowed; being defined by Sir Matthew Hale, "*sententia rerum divinarum humano sensu excogitata, palam docta et pertinaciter defensa*" (*i*). And here it must also be acknowledged, that particular modes of belief or unbelief, not tending to overturn christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What doctrines shall therefore be adjudged heresy, was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him.

Heresy an offence against God and religion. Its definition, history, mischief, and punishment.

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(*h*) *Mescroyants*, in our ancient law books, is the name of unbelievers.

upon divine subjects framed by human reason, openly taught and obstinately

(*i*) 1 Hal. P. C. 384. An opinion

defended.

(1) There are several other statutes relating to this offence, and to that of blasphemy; but as they do not alter the common law, which seems also to

afford the best remedy, it is not necessary to set them out. See further as to Blasphemy, *post*, 59.

For the general definition of an heretic given by Lyndewode (*j*), extends to the smallest deviations from the doctrines of holy church, “*hæreticus est qui dubitat de fide catholicâ, et qui negligit servare ea, quæ Romana ecclesia statuit, seu servare decreverat* (*k*).” Or, as the statute 2 Hen. IV. c. 15, expresses it in English, “teachers of erroneous opinions, contrary to the faith and blessed determinations of the holy church.” Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true that the sanctimonious hypocrisy of the canonists went at first no further than enjoining penance, excommunication, and ecclesiastical deprivation, for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus*. But in the mean time they had prevailed upon the weakness of bigotted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderetur* (*l*): well *knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the ancient Donatists and Manichæans by the Emperors Theodosius and Justinian (*m*): hence also the constitution of the Emperor Frederic mentioned by Lyndewode (*n*), adjudging all persons without distinction to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution (*o*), ordained that if any temporal lord, when admonished by the church, should

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(*j*) Cap. de hæreticis.

(*k*) A heretic is one who doubts of the Catholic faith, and who neglects to observe those ceremonies which the Roman church has appointed, or decreed, shall be observed.

(*l*) Decretal, l. 5, t. 40, c. 27.

That he might be relieved from capital punishment.

(*m*) Cod. l. 1, tit. 5.

(*n*) C. de hæreticis.

(*o*) Cod. l. 5, 4.

neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for, upon the authority of this very constitution, the pope afterwards expelled this very Emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou (*p*).

Christianity being thus deformed by the dæmon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our ancient precedents (*q*) a writ *de hæretico comburendo*, which is thought by some to be as ancient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself, in a provincial synod; and that the delinquent was delivered over to the king, to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de hæretico comburendo* being not a writ *of course, but issuing only by the special direction of the king in council (*r*).

The ancient writ, *de hæretico comburendo*, coeval with the common law.

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But in the reign of Henry the Fourth, when the eyes of the christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of lollardy) (*s*) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament (*t*), which sharpened the edge of persecution to its utmost keenness. For, by that statute, the diocesan alone, without the intervention of a synod, might convict of heretical tenets; and

(*p*) Baldus in Cod. l. 5, 4.

(*q*) F. N. B. 269.

(*r*) 1 Hal. P. C. 395.

(*s*) So called not from *lolium*, or tares, (an etymology, which was afterwards devised in order to justify the

burning of them, Matt. xiii. 30,) but from one Walter Lolhard, a German reformer, A.D. 1315; Mod. Un. Hist. xxvi. 13; Spelm. Gloss. 371.

(*t*) 2 Hen. IV., c. 15.

unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Hen. V. c. 7, lollardy was also made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's consistory.

Afterwards, when the final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated: for though what heresy is, was not then precisely defined, yet we are told in some points what it is *not*: the statute 25 Hen. VIII. c. 14, declaring, that offences against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31 Hen. VIII. c. 14, the bloody law of the six articles was made, which established the six most contested points of

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*popery, transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were "determined and resolved by the most godly study, pain, and travail of his majesty: for which his most humble and obedient subjects, the lords *spiritual* and temporal, and the commons, in parliament assembled, did not only render and give unto his highness their most high and hearty thanks," but did also enact and declare all oppugners of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the christian religion.

All statutes relating to heresy repealed in the reign of Elizabeth.

I shall not perplex this detail with the various repeals and revivals of these sanguinary laws in the two succeeding reigns, but shall proceed directly to the reign of Queen Elizabeth; when the reformation was finally established

with temper and decency, unsullied with party rancour, or personal caprice and resentment. By statute 1 Eliz. c. 1, all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law; *viz.* as to the infliction of common censures, in the ecclesiastical courts; and in case of burning the heretic, in the provincial synod only (*v*). Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also, though he agrees, that in either case the writ *de hæretico comburendo* was not demandable of common right, but grantable or otherwise merely at the king's discretion (*u*). But the principal point now gained was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being to be so determined, but only such tenets, which have been heretofore so declared, 1. By the words of the canonical scriptures; 2. By the first four general councils, or such *others as have only used the words of the holy scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before; though it might not have been the worse to have defined it in terms still more precise and particular: as a man continued still liable to be burnt, for what perhaps he did not understand to be heresy, till the ecclesiastical judge so interpreted the words of the canonical scriptures.

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For the writ *de hæretico comburendo* remained still in force; and we have instances of its being put in execution upon two anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James the First. But it was totally abolished, and heresy again subjected only to ecclesiastical correction *pro salute animæ*, by virtue of the statute 29 Car. II. c. 9. For, in one and the same reign, our lands were delivered from the slavery of military tenures: our bodies from arbitrary imprisonment by the *habeas corpus* act; and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law.

The writ *de hæretico comburendo* abolished, military tenures exploded, and the *habeas corpus* act passed in one reign.

In what I have now said, I would not be understood to derogate from the just rights of the national church, or to

Heresy now not sufficiently defined.

(*v*) 5 Rep. 23; 12 Rep. 56, 92.

(*u*) 1 Hal. P. C. 405.

favour a loose latitude of propagating any crude undigested sentiments in religious matters. Of propagating, I say; for the bare entertaining them, without an endeavour to diffuse them, seems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Every thing is now as it should be, with respect to the spiritual cognizance, and spiritual punishment, of heresy: unless perhaps that the crime ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics; yet not to harass them with temporal penalties, much less to exterminate or *destroy them. The legislature hath indeed thought it proper, that the civil magistrate should again interpose, with regard to one species of heresy, very prevalent in modern times; for, by statute 9 and 10 W. III. c. 32, if any person educated in the christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be God, or maintain that there are more Gods than one, he shall undergo the same penalties and incapacities, which were just now mentioned to be inflicted on apostacy by the same statute (2). And thus much for the crime of heresy.

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Acts affecting the established church are offences against God and religion, and are,
1. Positive,
2. Negative.

Reviling the ordinances of the church is a positive offence against God and religion.

III. Another species of offences against religion are those which affect the *established church*. And these are either positive, or negative: positive, by reviling its ordinances; or negative, by non-conformity to its worship. Of both of these in their order.

1. And, first, of the offence of *reviling the ordinances* of the church. This is a crime of a much grosser nature than the other of mere non-conformity; since it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by setting up private judgment in virulent and factious opposition to public authority; arrogance, by treating with con-

(2) 53 Geo. III. c. 160, intituled, "An Act to relieve persons who impugn the doctrine of the Holy Trinity from certain Penalties," repeals the

Act of W. & M. respecting the denial of the Trinity, and also the provisions of 9 & 10 W. III. as far as they bear relation to the same subject.

tempt and rudeness what has at least a better chance to be right, than the singular notions of any particular man; and ingratitude, by denying that indulgence and undisturbed liberty of conscience to the members of the national church, which the retainers to every petty conventicle enjoy. However, it is provided by statutes 1 Edw. VI. c. 1, and 1 Eliz. c. 1, that whoever reviles the sacrament of the Lord's Supper shall be punished by fine and imprisonment: and, by the statute 1 Eliz. c. 2, if any minister shall speak any thing in derogation of the book of common prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: and, if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second offence he shall be deprived, and suffer one year's imprisonment; and, for the third, shall in like manner be deprived, and suffer imprisonment for life. *And if *any person* whatsoever shall in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit, for the first offence, an hundred marks; for the second, four hundred; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. These penalties were framed in the infancy of our present establishment: when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy: and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under Providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time (of the milder penalties at least) be thought too severe and intolerant; so far as they are levelled at the offence, not of *thinking* differently from the national church, but of *railing* at that church and *obstructing* its ordinances, for not submitting its public judgment to the private opinion of others. For, though it is clear, that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship; yet contumely and contempt are what no establishment can tolerate (v). A rigid attachment to trifles, and an intempe-

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(v) By an ordinance 23 Aug. 1645, which continued till the Restoration,

rate zeal for reforming them, are equally ridiculous and absurd: but the latter is at present the less excusable, because from political reasons, sufficiently hinted at in a former volume (*w*), it would now be extremely unadvisable to make any alterations in the service of the church; unless by its own consent, or unless it can be shewn that some manifest impiety or shocking absurdity will follow from continuing the present forms.

Non-conformity to the worship of the church is a negative offence, and of a lighter degree than the former.

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2. Non-conformity to the worship of the church is the other, or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a *matter of private conscience, to the scruples of which our present laws have shewn a very just and christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indulgence into such extremes, as may endanger the national church: there is always a difference to be made between toleration and establishment (3).

Non-conformists are, 1, Those who profess no religion, and—

Non-conformists are of two sorts: first, such as absent themselves from divine worship in the established church,

to preach, write, or print, any thing in derogation or depraving of the *directory*, for the then established presbyterian worship, subjected the of-

fender, upon indictment, to a discretionary fine, not exceeding fifty pounds; (Scobell, 98.)

(*w*) Vol. I. page 98.

(3) It is difficult to understand how non-conformity to the worship of the established church, when founded on principles conscientious and sincere, can with propriety be called an "offence" at all, either positive or negative; much less an "offence against God and religion." Nor is it easy to justify the denominating toleration an "indulgence." Liberty of conscience in matters of religion is one of the natural and inalienable rights of mankind; and the indulgence seems more properly to come from the great majority of non-conformists towards the comparatively small number of those who compose the established church: for, though the former are contented to accept of to-

leration as a boon, while the enjoyment of it is secured to them by the law of the land, the latter would find it difficult to withhold it as a right, if any alteration in the law upon the subject should compel the former to claim it in that character. The repeal of the Test and Corporation Acts by the statute 9 Geo. IV. c. 17, see *post*, 59 n. (14,) has removed some of the disabilities which so long pressed upon protestant dissenters; and the passing of the statute 10 Geo. IV. c. 7, intituled, "An Act for the Relief of his Majesty's Roman Catholic Subjects," see *post*, 58 n. (9), has at length rendered the same justice to papists.

through total irreligion, and attend the service of no other persuasion. These by the statutes of 1 Eliz. c. 2, 23 Eliz. c. 1, and 3 Jac. I. c. 4, forfeit one shilling to the poor every Lord's day they so absent themselves, and 20% to the king if they continue such default for a month together. And if they keep any inmate, thus irreligiously disposed, in their houses, they forfeit 10% *per month*.

The second species of non-conformists, are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the reformation, to be papists and protestant dissenters: both of which were supposed to be equally schismatics in not communicating with the national church; with this difference, that the papists divided from it upon material, though erroneous, reasons; but many of the dissenters upon matters of indifference, or, in other words, upon no reason at all. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or, which is often the case, through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are such as threaten ruin or disturbance to the state. He is bound indeed to protect the established church: *and, if this can be better effected, by admitting none but its genuine members to offices of trust and emolument, he is certainly at liberty so to do; the disposal of offices being matter of favour and discretion. But, this point being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and colour of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind must be left to the option of every man's private judgment.

2. Protestant dissenters and papists, who were originally considered as equally schismatics.

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With regard therefore to *protestant dissenters*, although the experience of their turbulent disposition in former times occasioned several disabilities and restrictions, which I shall not undertake to justify, to be laid upon them by abundance

Indulgence and protection afforded to protestant dissenters by various statutes.

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of statutes (*x*), yet at length the legislature, with a spirit of true magnanimity, extended that indulgence to these sectaries, which they themselves, when in power, had held to be countenancing schism, and denied to the church of England (*y*). The penalties are conditionally suspended by the statute 1 W. and M. st. 1, c. 18, "for exempting their majesties protestant subjects, dissenting from the church of England, from the penalties of certain laws," commonly called the Toleration Act; which is confirmed by statute 10 Ann. c. 2, and declares that neither the laws above mentioned, nor the statutes 1 Eliz. c. 2, § 14; 3 Jac. 1, c. 4 and 5, nor any other penal laws made against popish recusants, except the test acts, shall extend to any dissenters, other than papists and such as deny the trinity: provided, 1. That they take the oaths of allegiance and supremacy, or make a similar affirmation, being quakers (*z*), and subscribe the declaration against popery; 2. That they repair to some congregation certified to and registered (4) in the court of the bishop or archdeacon, or at the county sessions; 3. That the doors of such meeting-house shall be unlocked, unbarred, and unbolted, in default of which *the persons meeting there are still liable to all the penalties of the former acts. Dissenting teachers, in order to be exempted from the penalties of the statutes 13 and 14 Car. II. c. 4; 15 Car. II. c. 6; 17 Car. II. c. 2, and 22 Car. II. c. 1, are also to subscribe the articles of religion mentioned in the statute 13 Eliz. c. 12, which only concern the confession of the true christian faith, and

(*x*) 23 Eliz. c. 1; 29 Eliz. c. 6; 35 Eliz. c. 1; 22 Car. II. c. 1.

(*y*) The ordinance of 1645, before cited, inflicted imprisonment for a year on the third offence, and pecuniary pe-

nalties on the former two, in case of using the book of common prayer not only in a place of public worship, but also in any private family.

(*z*) See stat. 8 Geo. I. c. 6.

(4) See 52 Geo. III. c. 155. By this statute, all places set apart for the performance of public worship, must be properly certified and registered. They are required to be certified to the bishop of the diocese, or the archdeacon, or to the general quarter sessions of the peace within the district, and to be registered in the said bishop's or arch-

deacon's court, and afterwards registered and recorded by the clerk of the peace. All persons omitting to certify according to the provisions of this act are liable to a penalty of 20*l.*, and not less than 20*s.*, at the discretion of the convicting justice. This act repealed the 13 & 14 Car. II. c. 1; 17 Car. II. c. 2, and 22 Car. II. c. 1.

the doctrine of the sacraments, with an express exception of those relating to the government and powers of the church, and to infant baptism; or if they scruple subscribing the same, shall make and subscribe the declaration prescribed by statute 19 Geo. III. c. 44, professing themselves to be christians and protestants, and that they believe the scriptures to contain the revealed will of God, and to be the rule of doctrine and practice. Thus, though the crime of non-conformity is by no means universally abrogated, it is suspended and ceases to exist with regard to these protestant dissenters, during their compliance with the conditions imposed by these acts; and, under these conditions, all persons, who will approve themselves no papists or oppugners of the trinity, are left at full liberty to act as their consciences shall direct them, in the matter of religious worship (5). And if any person shall wilfully, maliciously, or contemptuously disturb any congregation, assembled in any church or permitted meeting-house, or shall misuse any preacher or teacher there, he shall, by virtue of the same statute, 1 W. and M. be bound over to the sessions of the peace, and forfeit twenty pounds (6).

(5) By 52 Geo. III. c. 155, s. 4, persons officiating in, or resorting to religious establishments duly certified according to the provisions of this Act, or any other Acts, are as fully relieved from all pains and penalties under any Act or Acts relating to religious worship, as any person who has made the declaration, and taken the oaths as required by 1 W. & M., or any Act amending it. By sec. 5, any person not having taken the oath, and subscribed the declaration as specified in the 19 Geo. III. c. 44, may be required to do so by any one justice; and, on refusal, he is prohibited from teaching or preaching in any place of religious worship, until he shall have taken and subscribed the same, on pain of forfeiting for every offence any sum not exceeding 10*l.*, and not less than 10*s.* By sec. 6, persons required to take the oaths, are not bound to go more than five miles from home to obey the magistrate's summons. And by

sec. 7, any Protestant subject may require any one justice to administer the oath and tender the declaration.

(6) By 52 Geo. III. c. 155, s. 12, "If any person or persons, at any time after the passing of this Act, do and shall wilfully and maliciously, or contemptuously disturb or disquiet any meeting or assembly or congregation of persons assembled for religious worship, permitted or authorized by this Act or any former Act or Acts of Parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly or congregation, or any person or persons there assembled, such person or persons so offending, upon proof thereof before any justice of the peace, by two or more credible witnesses, shall find two sureties to be bound by recognizances in the penal sum of £50, to answer for such offence, and in default of such sureties shall be committed to prison, there to remain

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Reasons why a similar toleration cannot be extended to papists.

But by statute 5 Geo. I. c. 4, no mayor or principal magistrate, must appear at any dissenting meeting with the ensigns of his office (*a*), on pain of disability to hold that or any other office: the legislature judging it a matter of propriety, that a mode of worship, set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude, and humility. Dissenters also, who subscribe the declaration of the act 19 Geo. III. are exempted, unless in the case of endowed schools and colleges, from the penalties of the statutes 13 and 14 Car. II. c. 4, and 17 Car. II. c. 2, which prohibit, upon pain of fine and imprisonment, all persons from teaching school unless they be licensed by the ordinary, and *subscribe a declaration of conformity to the liturgy of the church, and reverently frequent divine service *established* by the laws of this kingdom.

As to *papists*, what has been said of the protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of relicks and

(*a*) Sir Humphry Edwin, a lord mayor of London, had the imprudence soon after the Toleration Act to go to a presbyterian meeting-house in his

formalities; which is alluded to by Dean Swift, in his "Tale of a Tub," under the allegory of Jack getting on a great horse, and eating custard.

till the next general or quarter sessions; and, upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of £40."

An indictment on this statute may be removed into the Court of King's Bench by certiorari before trial; *Rex v. Wadley*, 4 M. & S. 508. But a motion must be made for that purpose, as is now indeed required in every case of a removal of an indictment from an inferior court, by stat. 5 & 6 W. IV. c. 33. The place, we have seen, *ante* p. 53,

n. (4), must be registered, but it seems immaterial whether the officiating minister has qualified or not; *Rex v. Hale*, Peake, 132; 5 T. R. 542. The statute has been held to extend to a congregation of foreign Lutherans; *ibid.* Where, in a contest for the situation of clerk, one clerk pulled another from the desk, it was held within the statute; *ibid.*

By stat. 31 Geo. III. c. 30, s. 10, similar protection is given to roman catholics.

images; nay even their transubstantiation. But while they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

Let us therefore now take a view of the laws in force against the papists; who may be divided into three classes, persons professing popery, popish recusants convict, and popish priests. 1. Persons professing the popish religion, besides the former penalties for not frequenting their parish church, are disabled from taking their lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the age of twenty-one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they may not keep or teach any school under pain of perpetual imprisonment; and, if they willingly say or hear mass, they forfeit the one two hundred, the other one hundred marks, and each shall suffer a year's imprisonment. Thus much for persons, who, from the misfortune of family prejudices or otherwise, have conceived an unhappy attachment to the Romish church from their infancy, and publicly profess its errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributes to their maintenance when there; *both the sender, the sent, and the contributor, are disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostacy, or perversion, where a person is reconciled to the see of Rome, or procures others to be reconciled, the offence amounts to high treason. 2. Popish recusants, convicted in a court of law of not attending the service of the church of England, are subject to the following disabilities, penalties, and forfeitures, over and above those before mentioned. They are considered as persons excommunicated; they can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of

The three classes of papists defined, and the laws affecting each reviewed.

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[*57]

London, on pain of 100*l.*; they can bring no action at law, or suit in equity; they are not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting all their goods; and they may not come to court under pain of 100*l.* No marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, shall forfeit two-thirds of her dower or jointure, may not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rate of 10*l.* a month, or the third part of all his lands. And lastly, as a feme covert recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's licence, they shall be guilty of felony, and suffer death as felons without benefit of clergy. There is also an inferior species of recusancy, refusing to make the declaration against popery enjoined by statute 30 Car. II. st. 2, when tendered by the proper magistrate, which, if the party resides within ten miles of London, makes him an absolute recusant convict; or, if at a greater distance, suspends him from having any seat in *parliament, keeping arms in his house, or any horse above the value of five pounds. This is the state, by the laws now in being (*b*), of a lay papist. But, 3. The remaining species or degree, *viz.* popish priests, are in a still more dangerous condition. For by statute 11 and 12 W. III. c. 4, popish priests or bishops, celebrating mass or exercising any part of their functions in England, except in the houses of ambassadors, are liable to perpetual imprisonment. And by the statute 27 Eliz. c. 2, any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea, unless driven by stress of weather and tarrying only a reasonable time (*c*), or shall be in England three days without conforming and

(*b*) Stat. 23 Eliz., c. 1; 27 Eliz., c. 2; 29 Eliz., c. 6; 35 Eliz., c. 2; 1 Jac. I., c. 4; 3 Jac. I., c. 4 & 5; 7 Jac. I., c. 6; 3 Car. I., c. 3; 25 Car. II., c. 2; 30 Car. II., st. 2; 1 W. & M., c. 9, 15, & 26; 11 & 12 W. III., c. 4; 12 Ann, st. 2, c. 14; 1 Geo. I., st. 2, c. 55; 3 Geo. I., c. 18; 12 Geo. II., c. 17.
(*c*) Raym. 377; Latch. 1.

taking the oaths, is guilty of high treason : and all persons harbouring him are guilty of felony without the benefit of clergy.

This is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes (*d*), that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed, what foreigners who only judge from our statute book are not fully apprized of, that these laws are seldom exerted to their utmost rigour ; and, indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved, upon a cool review, as a standing system of law. The restless machinations of the jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the Queen of Scots, obliged the parliament to counteract so dangerous a spirit by laws of a great, and then perhaps necessary, severity. The powder-treason, in the succeeding reign, struck a panic into *James I. which operated in different ways : it occasioned the enacting of new laws against the papists ; but deterred him from putting them in execution. The intrigues of Queen Henrietta in the reign of Charles I., the prospect of a popish successor in that of Charles II., the assassination-plot in the reign of King William, and the avowed claim of a popish pretender to the crown in that and subsequent reigns, will account for the extension of these penalties at those several periods of our history. But if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable, not only in England but in every kingdom of Europe ; it probably would not then be amiss to review and soften these rigorous edicts ; at least till the *civil* principles of the roman catholics called again upon the legislature to renew them : for it ought not to be left in the breast

The original enactment of those laws defended : the propriety of softening their rigour considered.

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(*d*) Sp. L. b. 19, c. 27.

of every merciless bigot, to drag down the vengeance of these occasional laws upon inoffensive, though mistaken, subjects; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

How far those laws have been already mitigated.

This hath partly been done by statute 18 Geo. III. c. 60, with regard to such papists as duly take the oath therein prescribed, of allegiance to his majesty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by authority of the see of Rome: in respect of whom only, the statute of 11 and 12 W. III. is repealed, so far as it disables them from purchasing or inheriting, or authorizes the apprehending or prosecuting the popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth (7) (8).

(7) But now by the stat. 31 Geo. III., c. 32 (amended and explained by 43 Geo. III., c. 30,) which may be called the Toleration Act of the roman catholics, all the severe and cruel restrictions and penalties, enumerated by the learned judge, are removed from those roman catholics, who are willing to comply with the requisitions of that statute, which are, that they must appear at some of the courts of Westminster, or at the quarter sessions held for the county, city, or place where they shall reside, and shall make and subscribe a declaration, that they profess the roman catholic religion, and also an oath which is exactly similar to that required by the 18 Geo. III. c. 60, the substance of which is stated above in the text. Of this declaration and oath being duly made by any roman catholic, the officer of the court shall grant him a certificate; and such officer shall yearly transmit to the privy council lists of all persons who have thus qualified themselves within the year in his respective court. The statute then provides, that a roman catholic, thus qualified, shall not be prosecuted under any statute for not repairing to a parish

church, nor shall he be prosecuted for being a papist, nor for attending or performing mass or other ceremonies of the church of Rome; provided that no place shall be allowed for an assembly to celebrate such worship until it is certified to the sessions; nor shall any minister officiate in it, until his name and description are recorded there. And no such place of assembly shall have its doors locked or barred during the time of meeting or divine worship.

And if any roman catholic whatever is elected constable, church-warden, overseer, or into any parochial office, he may execute the same by a deputy, to be approved as if he were to act for himself as principal. But every minister, who has qualified, shall be exempt from serving upon juries, and from being elected into any parochial office. And all the laws for frequenting divine service on Sundays, shall continue in force, except where persons attend some place of worship allowed by this statute, or the Toleration Act of the dissenters, 1 W. & M.

And if any person disturb a congregation allowed under this act, he shall, as for disturbing a dissenting meeting,

In order the better to secure the established church against perils from non-conformists of all denominations, in-

The *corporation* and *test* acts the bulwarks of the church: their object explained.

be bound over to the next sessions, and upon conviction there, shall forfeit twenty pounds.

But no roman catholic minister shall officiate in any place of worship having a steeple and a bell, or at any funeral in a church or churchyard, or shall wear the habits of his order, except in a place allowed by this statute, or in a private house, where there shall not be more than five persons besides the family. This statute shall not exempt roman catholics from the payment of tithes, or other dues, to the church; nor shall it affect the statutes concerning marriages, or any law respecting the succession to the crown. No person, who has qualified, shall be prosecuted for instructing youth, except in an endowed school, or a school in one of the English universities; and except also, that no roman catholic schoolmaster shall receive into his school the child of any protestant father; nor shall any roman catholic keep a school until his, or her name be recorded as a teacher at the sessions.

But no religious order is to be established; and every endowment of a school or college by a roman catholic shall still be superstitious and unlawful. And no person henceforth shall be summoned to take the oath of supremacy, and the declaration against transubstantiation. Nor shall roman catholics, who have qualified, be removable from London and Westminster; neither shall any peer, who has qualified, be punishable for coming into the presence, or palace, of the king or queen. And no papists whatever shall be any longer obliged to register their names and estates, or enrol their deeds and wills. And every roman catholic, who has qualified, may be permitted to act as a barrister, attorney, and notary.

The roman catholics cannot sit in either house of parliament, because every member of parliament must take

the oath of supremacy, and repeat and subscribe the declaration against transubstantiation: see 1 vol. 162. Nor can they vote at elections for the members of the House of Commons, because, before they vote, they must take the oath of supremacy. Ibid. 180.

The roman catholics in Ireland are permitted to vote at elections, but they cannot sit in either house of parliament.

A bequest or disposition for the purpose of educating children in the roman catholic religion is unlawful. But the fund will not pass to the testator's next of kin, but it shall be applied to such charitable purposes as his Majesty shall please to direct by his sign manual. *Cary v. Abbot*, 7 Ves. jun. 490.—CH.

(8) By 43 Geo. III. c. 30, all roman catholics who shall take and subscribe the declaration and oath specified in the 31 Geo. III. c. 32, are as fully entitled to the benefits of the 18 Geo. III. c. 60, as if the oath prescribed by that act had been taken.

53 Geo. III. c. 128, provides certain rules as to taking commissions in the army, and relieves roman catholics from the restrictions and penalties contained in 25 C. II. c. 2.

But now by the 10 Geo. 4, c. 7, intituled "An Act for the relief of his Majesty's Roman Catholic Subjects," and reciting that, by various acts of parliament, certain restraints and disabilities are imposed on the roman catholic subjects of his Majesty, to which other subjects of his Majesty are not liable; and the expediency that such restraints and disabilities should be from thenceforth discontinued; and that by various acts certain oaths and certain declarations, commonly called the declaration against transubstantiation, and the declaration against transubstantiation and the invocation of saints, and the sacrifice of the mass, as

fidels, turks, jews, heretics, papists, and sectaries, there are however two bulwarks erected, called the *Corporation* and

practised in the church of Rome, are or may be required to be taken, made, and subscribed by the subjects of his Majesty, as qualifications for sitting and voting in parliament, and for the enjoyment of certain offices, franchises, and civil rights: It is enacted,

Sect. 1, That from and after the commencement of that act, (23d April, 1829, § 40); all such parts of the said acts as require the said declarations, or either of them, to be made or subscribed by any of his Majesty's subjects as a qualification for sitting and voting in parliament, or for the exercise or enjoyment of any office, franchise, or civil right, be, and the same are (save as hereinafter provided and excepted) thereby repealed.

By sect. 2, catholics may sit and vote in parliament on taking the following oath:—

“ I, A. B., do sincerely promise and swear, that I will be faithful and bear true allegiance to his Majesty King George the Fourth, and will defend him to the utmost of my power, against all conspiracies and attempts whatever, which shall be made against his person, crown, or dignity; and I will do my utmost endeavour to disclose and make known to his Majesty, his heirs, and successors, all treasons and traitorous conspiracies which may be formed against him or them; and I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the crown, which succession, by an act intituled ‘ An Act for the further limitation of the Crown, and better securing the rights and liberties of the Subject,’ is and stands limited to the Princess Sophia, Electress of Hanover, and the heirs of her body, being protestants; hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of this realm; and I do further declare, that it is not an article of my

faith, and that I do renounce, reject, and abjure the opinion, that princes excommunicated or deprived by the Pope, or any other authority of the See of Rome, may be deposed or murdered by their subjects, or by any person whatsoever; and I do declare, that I do not believe that the Pope of Rome, or any other foreign prince, prelate, person, state, or potentate, hath, or ought to have any temporal or civil jurisdiction, power, superiority, or pre-eminence, directly or indirectly, within this realm; I do swear, that I will defend to the utmost of my power, the settlement of property within this realm, as established by the laws; and I do hereby disclaim, disavow, and solemnly abjure any intention to subvert the present church establishment, as settled by law within this realm; and I do solemnly swear, that I never will exercise any privilege to which I am or may become entitled, to disturb or weaken the protestant religion or protestant government in the united kingdom; and I do solemnly, in the presence of God, profess, testify, and declare, that I do make this declaration, and every part thereof in the plain and ordinary sense of the words of this oath, without any evasion, equivocation, or mental reservation whatsoever. So help me God.”

By sect. 3, the name of the sovereign for the time being is to be used in the oath.

By sect. 4, no catholic shall sit or vote in parliament until he has taken the oath.

By sect. 5, catholics may vote at elections of members of parliament for England and Ireland, and at elections of representative peers of Scotland and Ireland, and be elected such peers upon taking the oath.

By sect. 6, the oath shall be administered in the same manner as former oaths.

By sect. 7, persons administering

Test Acts (9), by the former of which (*e*) no person can be legally elected to any office relating to the government of any

(*e*) Stat. 13 Car. II. st. 2, c. 1.

the oath at elections shall take an oath duly to administer.

By sect. 8, so much of any acts as requires the formula contained in 8 & 9 Wm. 3, c. 3, (Scotland), to be tendered or taken, is repealed, and catholics may elect and be elected members of parliament for Scotland.

By sect. 9, no catholic priest can sit or vote in the House of Commons.

By sect 10, catholics, upon taking the oath, may hold civil and military offices under the crown, except (sect. 12), those of guardians, and justices of the kingdom, regent, lord chancellor, lord keeper, or lord commissioner of the great seal, lord lieutenant of Ireland, and high commissioner to the general assembly of the church of Scotland.

By sect. 11, catholics are not to be exempt from taking any other oaths of office required.

By sect. 13, nothing in the act contained shall affect or alter the 7 Geo. IV. c. 72.

By sect. 14, catholics may be members of lay corporations, upon taking the oath.

By sect. 15, such members of lay corporations shall not vote in ecclesiastical appointments.

By sect. 16, catholics shall not hold offices, &c. in the established church, or ecclesiastical courts, universities, colleges, or schools; nor present to benefices.

By sect 17, presentations to benefices belonging to offices held by catholics, shall devolve upon the archbishop of Canterbury.

By sect. 18, catholics shall not advise the crown in the appointment to offices in the established church.

Sect. 19, prescribes the time and manner of catholics taking oaths for corporate offices, &c.

Sect. 20, does the same with respect to other offices.

Sect. 21, imposes a penalty upon catholics acting in offices without taking the oath, and avoids the offices.

By sect. 22, naval and military officers shall take the oath.

By sect. 23, no other oaths shall be necessary to be taken by catholics.

Sect. 24, imposes a penalty upon catholics assuming titles to sees, &c.

By sect. 25, judicial or other officers shall not attend with the insignia of office at any place of worship, other than the established church, under a penalty.

By sect. 26, catholic ecclesiastics shall not officiate, except in their usual places of worship, or in private houses, under a penalty.

By sect. 27, nothing in the act contained shall repeal, alter, or affect the 5 Geo. 4, c. 25.

Sect. 28, provides for the suppression of jesuits, and other religious orders of the church of Rome.

By sect. 29, jesuits, &c., coming into the realm, shall be banished.

By sect. 30, natural born subjects, being jesuits, may return into the kingdom, and be registered.

By sect. 31, licences may be granted to jesuits, &c., to come into the kingdom and be registered.

By sect. 32, accounts of such licences shall be annually laid before parliament.

By sect. 33, admitting persons as members of such religious orders is made a misdemeanor.

By sect. 34, any person so admitted a member of such religious order shall be banished.

By sect. 35, the party so offending, and sentenced, may after thirty days be conveyed out of the kingdom, &c.

By sect. 36, if found at large after

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city or corporation, unless, within a twelvemonth before he has received the sacrament of the Lord's Supper according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office: or, in default of either of these requisites, such election shall be void (10). The other, called the Test Act (*f*), directs all officers civil and military to take the oaths and make the declaration against transubstantiation, in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also, within the *same time (11), to receive the sacrament of the Lord's Supper, according to the usage of the church of England, in some public church immediately after Divine service and sermon,

(*f*) Stat. 25 Car. II. c. 2, explained by 9 Geo. II. c. 26.

three months, he may be transported for life.

By sect. 37, these provisions are not to extend to female societies.

And sect. 38, provides for the recovery of penalties imposed by the act.

(9) These "*bulwarks of the church*," as the learned judge enthusiastically terms them, have now to the satisfaction of almost all classes of society, been for some years swept away; nor do any fears appear at present to be entertained, that the established church will in consequence be robbed of her security from "*the perils of non-conformists*." See *post* 59, note (13).

(10) By the 5 Geo. I. c. 6, § 3, the election into a corporate office shall not be void on account of the person elected having omitted to receive the sacrament within a year before the election, unless he shall be removed within six months after his election, or unless a prosecution be commenced within that time, and be carried on without delay; and during that time the office is not void, but only voidable; and the person elected, until a removal or prosecution within the time limited, is entitled to all the inci-

dental rights of his office in as full an extent as if he had actually received the sacrament within a year previous to his election. 2 Burr. 1016.—CH.

(11) The 25 Car. II. c. 2, the original test act, required, that both the sacrament and the oaths should be taken within three months; and by subsequent statutes, the time for taking the oaths has been enlarged to six months; but the time for taking the sacrament remains unaltered, which must still be taken within three months after admission into the office.

And by several statutes subsequent to the test act, various descriptions of persons, whose offices are not considered civil or military, are required to take the oaths within six months after their respective appointments, though they are not required to take the sacrament. Amongst these are all ecclesiastical persons promoted to benefices, members of colleges who have attained the age of 18 years, teachers of scholars or pupils, dissenting ministers, high constables, and practisers of the law. 1 Geo. I. st. 2. c. 13; 2 Geo. II. c. 31; 9 Geo. II. c. 26.—CH.

and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses; upon forfeiture of 500*l.*, and disability to hold the said office (12) (13). And of much the same nature with these is the statute 7 Jac. I. c. 2, which permits no persons to be naturalized or restored in blood, but such as undergo a like test: which test having been removed in 1753, in favour of the Jews, was the next session of parliament restored again with some precipitation.

Thus much for offences, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross im-

Different views of the spiritual and temporal courts in punishing such offences.

(12) But before the end of every sessions of parliament, an act is passed to indemnify all persons who have not complied with the requisition of the corporation and test acts, provided they qualify themselves within a time specified in the act; and provided also, that judgment in any action or prosecution has not been obtained against them for their former omission.—CH.

(13) By the 9 Geo. IV. c. 17, intitled “An Act for repealing so much of several Acts as imposes the necessity of receiving the sacrament of the Lord’s Supper as a qualification for certain offices and employments,” section 1, such parts of the acts enumerated by the learned judge as require the persons therein described to receive the sacrament for the purposes therein expressed, are repealed. Section 2 prescribes the form of a declaration to be used in lieu of the sacramental test; which, by section 3, is to be made and subscribed in the presence of two magistrates of the borough or division, and to be enrolled in a book kept for that purpose. By section 4, persons elected to any office neglecting to make such declaration, their election is to be void. Section 5 directs that persons admitted to any office under the crown, which heretofore required the taking of the sacrament, shall make the declaration within six months,

or their appointments to be void. By section 6, this declaration is to be made in the Court of Chancery, or King’s Bench, or at the Quarter Sessions. Section 7 makes a proviso for naval and military officers below the rank of rear admiral, major general, or colonel in the marines, and also certain officers of the revenue, who are not required to make the declaration. Section 8 indemnifies persons now holding offices, which heretofore required the taking of the sacrament, and who have omitted taking it, from all penalties. Section 9 provides, that persons omitting to make the declaration shall not affect others not privy thereto.

The following is a copy of the declaration:

“I, A. B., do solemnly and sincerely, in the presence of God, profess, testify, and declare, upon the true faith of a christian, that I will never exercise any power, authority, or influence which I may possess by virtue of the office of _____ to injure or weaken the protestant church as it is by law established in England, or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishop and clergy, are or may be by law entitled.” See *ante* 52, note (3).

pieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain; though with a view somewhat different: the spiritual court punishing all sinful enormities for the sake of reforming the private sinner, *pro salute animæ*; while the temporal courts resent the public affront to religion and morality on which all government must depend for support, and correct more for the sake of example than private amendment.

Blasphemy an offence against God and religion at common law. Christianity part of the law of the land.

IV. The fourth species of offences, therefore, more immediately against God and religion, is that of *blasphemy* against the Almighty, by denying his being or providence; or by contumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment (*g*): for christianity is part of the laws of England (*h*) (14) (15).

Profane swearing and cursing an offence against God and religion.

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V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common *swearing* and **cursing*. By the last statute against which, 19 Geo. II. c. 21, which repeals all former ones, every labourer, sailor, or soldier profanely cursing or swearing shall forfeit 1s., every other person

(*g*) 1 Hawk. P. C. 7.

(*h*) 1 Vent. 293, 2 Strange, 834.

(14) In the 34th year of Hen. VI. Chief Justice Prisot declared in the court of Common Pleas, *Scripture est common ley, sur quel toutes manieres de leis sont fondes.** See the year-book 34 Hen. VI. 40.—CH.

(15) Also seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. 1 Hawk. P. C. c. 5, § 6.

An obscene publication it appears is punishable as a libel; and to write against christianity subjects the offender to fine and imprisonment. 2 Geo. II. *Rex v. Woolston*; Holt on Libel, 67, n.d. Blasphemy is both a spiritual

and a temporal offence. Cro. Jac. 421; 2 Roll. Abr. 78. Pl. 2. A blasphemous libel may be prosecuted as an offence at common law. *Rex v. Carlisle*, 3 B. & A. 161. And it is not lawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature.—Ibid.

By 1 Geo. IV. c. 8, all copies of blasphemous publications may be seized, after the offenders are convicted, but if judgment be arrested or reversed, they may be claimed again.

* “The scriptures are the common law, upon which all other laws are founded.”

under the degree of a gentleman 2s., and every gentleman or person of superior rank 5s., to the poor of the parish; and, on a second conviction, double; and, for every subsequent offence, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness: and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him (16). If the justice omits his duty, he forfeits 5*l.*, and the constable 40*s.* And the act is to be read in all parish churches, and public chapels, the Sunday after every quarter day, on pain of 5*l.*, to be levied by warrant from any justice (17). Besides this punishment for taking God's name in vain in common discourse, it is enacted by statute 3 Jac. I. c. 21, that if, in any stage play, interlude, or show, the name of the holy trinity, or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10*l.*; one moiety to the king, and the other to the informer.

VI. A sixth species of offences against God and religion, of which our ancient books are full, is a crime of which one knows not well what account to give. I mean the offence of *witchcraft, conjuration, enchantment, or sorcery*. To deny the possibility, nay, actual existence of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament: and the thing itself is a truth to which every nation in the world hath in its turn borne testimony, either by examples seemingly well attested, or by prohibitory laws; which at least suppose the possibility of a commerce with evil spirits. The civil law punishes with death not only the sorcerers

Witchcraft an offence against God and religion. Its existence doubted, at least in modern times.

(16) The conviction must be within eight days after the offence, § 12. Each oath or curse being a distinct, complete offence, there can be no question, I conceive, but a person may incur any number of penalties in one day, though Dr. Burn doubts whether any number of oaths or curses in one day amount to more than one offence.

3 Burn, 325.

Persons belonging to his Majesty's navy, if guilty of profane cursing and swearing, are liable to suffer such punishment as a court martial shall think proper to inflict. 22 Geo. II. c. 33.—CH.

(17) This provision is repealed by 4 Geo. IV. c. 31.

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themselves, but also those who consult them (*i*); imitating in the former the express law of God (*k*), “thou shalt not suffer a witch to live.” And our own laws, both before and since the conquest, have been *equally penal; ranking this crime in the same class with heresy, and condemning both to the flames (*l*). The president Montesquieu (*m*) ranks them also both together, but with a very different view; laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals, and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. And indeed the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own (*n*), that in general there has been such a thing as witchcraft: though one cannot give credit to any particular modern instance of it.

The former and present laws against witchcraft contrasted. The cruelty of the former shewn.

Our forefathers were stronger believers, when they enacted, by statute 33 Hen. VIII. c. 8, all witchcraft and sorcery to be felony without benefit of clergy; and again by statute 1 Jac. I. c. 12, that all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or enchantment; or killing or otherwise hurting any person by such infernal arts, should be guilty of felony without benefit of clergy, and suffer death. And, if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offence, and death for the second. These acts continued in force till lately, to the terror of all ancient females in the kingdom: and many poor wretches were sacrificed thereby to the prejudice of their neighbours, and their own illusions; not a few

(*i*) Cod. l. 9, t. 18.

(*k*) Exod. xxii. 18.

(*l*) 3 Inst. 44.

(*m*) Sp. L. b. 12, c. 5.

(*n*) Mr. Addison, Spect. No. 117.

having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having at length followed the wise example of *Louis XIV. in France, who thought proper by an edict to restrain the tribunals of justice from receiving informations of witchcraft (*o*). And accordingly it is with us enacted by statute 9 Geo. II. c. 5, that no prosecution shall for the future be carried on against any person for conjuration, witchcraft, sorcery, or enchantment (18). But the misdemeanour of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory (19). [*62]

VII. A seventh species of offenders in this class are all *religious impostors*; such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment (*p*). Religious imposture an offence against God and religion.

VIII. Simony, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offence against religion; as well by reason of the sacredness of the charge which is thus profanely bought Simony an offence against God and religion, involving the crime of perjury.

(*o*) Voltaire Siecl. Louis xiv. ch. 29. Mod. Un. Hist. xxv. 215. Yet Voughlans (*de droit criminel*, 353, 459,) still reckons up sorcery and

witchcraft among the crimes punishable in France.

(*p*) 1 Hawk. P. C. 7.

(18) This act is said to have passed in consequence of an old woman being drowned at Tring in Hertfordshire, by her too credulous neighbours, who suspected her of witchcraft. In Ireland there is still a statute inflicting capital punishment upon witches, unrepealed. It was passed in the 28th Eliz. and it describes every species of the crime as minutely as the English statute, 1 Jac. I. c. 12; and it even provides for the trial of peers, who might happen to be charged with that crime. 1 Ld. Mountm. Hist. Irish

Parliaments.—CH.

(19) The punishment of the pillory is now by 56 Geo. III. c. 138, abolished in all cases, except the offences of perjury and subornation of perjury. And by 5 Geo. IV. c. 8, § 4, fortune-tellers, and persons using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his Majesty's subjects, are to be deemed rogues and vagabonds, and to be punished with imprisonment and hard labour. See *post* 169.

and sold, as because it is always attended with perjury in the person presented (*q*). The statute 31 Eliz. c. 6, which, so far as it relates to the forfeiture of the right of presentation, was considered in a former book (*r*), enacts, that if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years' value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same (20). If persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or other corrupt consideration (21).

[*63]

And persons who shall *corruptly ordain or licence any minister, or procure him to be ordained or licensed, which is the true idea of simony, shall incur a like forfeiture of forty pounds; and the minister himself of ten pounds, besides an incapacity to hold any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punished by the same statute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown (22).

(*q*) 3 Inst. 156.

(*r*) See vol. II. p. 279.

(20) In *Fox v. The Bishop of Chester*, in Error, 4 D. & R. 93, 2 B. & C. 635, it was held by the court of King's Bench that a contract for the sale of the next presentation to a living, the incumbent being then afflicted with a mortal disease, with the knowledge of the parties, was simoniacal, and void within the 31 Eliz. c. 6, though the purchaser had no intention of presenting any particular person; and a clerk being presented by the purchaser, it was held, that the presentation was void, although the clerk was not privy to the corrupt contract. That decision has been since overruled in the House of Lords, and the case is now referred to only as containing all the leading authorities upon the subject.

(21) Any resignation or exchange for money is corrupt, however appa-

rently fair the transaction; as where a father, wishing that his son in orders should be employed in the duties of his profession, agreed to secure, by a bond, the payment of an annuity exactly equal to the annual produce of a benefice, in consideration of the incumbent's resigning in favour of his son: the annuity being afterwards in arrear, the bond was put in suit, and the defendant pleaded his simoniacal resignation in bar; and Lord Mansfield and the court, though they declared that it was an unconscientious defence, yet, as the resignation had been made for money, determined, that it was corrupt and simoniacal, and, in consequence, that the bond was void. *Young v. Jones*, E. T. 1782.—CH.

(22) By stat. 9 Geo. IV. c. 94, bonds of resignation of any benefice in

IX. Profanation of the Lord's day, vulgarly, but improperly, called *sabbath-breaking*, is a ninth offence against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal, of permitting any secular business to be publicly transacted on that day, in a country professing christianity, and the corruption of morals which usually follows its profanation, the keeping one day in seven holy, as a time of relaxation and refreshment, as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of conversation and society the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their maker. And therefore the laws of king Athelstan (s) forbade all merchandising on the Lord's day, under very severe penalties. And by the statute 27 Hen. VI. c. 5, no fair or market shall be held on the principal festivals, Good Friday, or any Sunday, except the four Sundays in harvest, on pain of forfeiting the goods exposed to sale. And, since by the statute 1 Car. I. c. 1, no person shall assemble, out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or *bear-baiting, interludes, plays, or other *unlawful* exercises, or pastimes; on

Sabbath breaking held an offence against God and religion, from the earliest antiquity.

[*64]

(s) C. 24.

favour of a son, grandson, brother, uncle, nephew, or grandnephew, upon notice or request, are rendered valid, notwithstanding the 31 Eliz. c. 6; but the new act is not to extend to any engagements, unless the deed be deposited, within two months, with the registrar of the diocese, or peculiar jurisdiction, wherein the benefice is situated. The passing of this act, it is believed, arose out of the fluctuating and contradictory decisions of our

courts upon the subject. In the *Bishop of London v. Ffytche*, 1 East, 487; 4 T. R. 801, n., it is said, "Seemle that a general bond to resign upon the request of the patron, is *not illegal*." That decision, if such it can be deemed, was reversed in parliament. In *Bagshaw v. Bossley*, 4 T. R. 78, it was *held*, that a bond given by an incumbent to the patron, on presentation, to reside on the living, or to resign if he did not return to it after notice, and

pain that every offender shall pay 3s. 4d. to the poor (23). This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the Lord's day, after divine service is over. But by statute 29 Car. II. c. 7, no person is allowed to *work* on the Lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity (24), on forfeiture

also not to commit waste on the parsonage house, was good. In *Partridge v. Whiston*, 4 T. R. 359, it was doubted, whether a bond of resignation, with a condition to reside, to resign for the patron's son to be presented, and to keep the premises on the living in repair, *was, or was not, good in law*. In *Lord Sondes v. Fletcher*, 5 B. & A. 835, a bond was conditioned for the resignation of a living, which the defendant, when requested, refused to resign; and it was held, that he was a wrong-doer, and that the plaintiff might recover. That case was afterwards carried to the House of Lords, where the decision of the court of King's Bench was reversed, and the resignation bond held to be void, after much discussion and much difference of opinion among the judges. And see *Gibson's Codex*, 799, 800; *Watson's Complete Incumbent*, 37, 8; *Burn's Eccl. Law*, iii. 353, et seq., and the cases there respectively collected.

(23) The statute 1 Car. I. c. 1, is confined to *unlawful* exercises and pastimes, and it has never yet been decided that *bull-baiting* is unlawful. By 3 Geo. IV. c. 71, if any person shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle, such person shall be liable to a penalty not exceeding 5*l.*, nor less than 10*s.* But *bulls* not being specifically named in that statute, it has been held that bull-baiting is not an offence within its operation. *Ex-parte Hill*, 1 M. & R. M. C. 105. See also the note, *Id.* 106. The

statute in question was undoubtedly intended to include and put down the practice of bull-baiting; and the friends of humanity must lament, that so desirable a portion of its object has been defeated by the accidental omission of a single word. Several attempts have since been made to pass a specific law for the abolition of this barbarous practice, but hitherto without success. The decision in *ex-parte Hill* may be considered, by persons unskilled in rules of law, and ignorant of their importance, to have been founded on somewhat subtle distinctions; but, where such distinctions are made in favour of the liberty of the subject, as in that case, they surely deserve praise rather than reprehension.

(24) Milk may be cried and sold before nine in the morning and after four in the afternoon. 29 Car. 2, c. 7, § 3.

Meat may be dressed and sold in inns, cook's shops, and victualling houses. *Id.*

Mackerel may be sold before and after divine service. 10 & 11 W. III. c. 24.

Bread may be sold between nine in the morning and one in the afternoon, and bakings delivered till half-past one in the afternoon. 3 Geo. IV. c. 106, § 16.

A limited number of watermen may ply on the Thames, under certain regulations, and within certain limits. 7 & 8 Geo. IV. c. 75, § 42.

Fish carriages are allowed to travel on Sundays either laden or returning empty. 2 Geo. III. c. 15. Persons

of 5s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings (25).

X. Drunkenness (26) is also punished by statute 4 Jac. I. c. 5, with the forfeiture of 5s.; or the sitting six hours in the

Drunkenness
an offence
against God
and religion.

exercising their calling on a Sunday are only subject to one penalty; for the whole is but one offence, or one act of exercising, though continued the whole day; Cowp. 640.

(25) It has been recently held, that the driver of a stage-van to and from London to York is a common carrier within the meaning of 3 Car. I. c. 1, and subject to the penalties thereof for travelling on Sunday; *Rex v. Middleton*, 4 D. & R. 824. Where a parol contract was entered into for the purchase of a horse above the value of 10*l.*, on a Sunday, with a warranty of soundness, and the horse was not delivered and paid for until the following Tuesday, held, first, that the contract was not complete until the latter day; and second, that supposing it to be void within the 29 Car. II. c. 7, § 2, still it was not an available objection on the part of the vendor in an action for a breach of the warranty, the vendee being ignorant of the fact, that the former was exercising his ordinary calling on the Sunday. *Bloxsome v. Williams*, 5 D. & R. 82; 3 B. & C. 232.

It has been held, that this statute applies to private as well as public conduct; and therefore, that a horse-dealer cannot maintain an action upon a private contract for the sale and warranty of a horse if made on a Sunday. *Fennell v. Ridler*, 8 D. & R. 204; 5 B. & C. 406. So in *Smith v. Sparrow*, 12 Moore, 266; 4 Bing, 84; 2 C. & P. 554, it was held that an action would not lie on a contract made on a Sunday, though made by an agent, and though the objection was taken by the principal: but, in *Rex v. Whitnash*, 1 M. & R. 452; 7 B. & C. 596, it was held, that a contract of hiring and service for a year, made between a farmer and a labourer on a Sunday,

was not within the prohibition of section 1 of the act, and that due service under it conferred a settlement; and in *Sandiman v. Bridge*, 1 M. & R. 457, note; 9 D. & R. 796; 7 B. & C. 96, it was held, that stage-coach proprietors were not prohibited from travelling on a Sunday by either of the acts, 3 Car. I. c. 1, or 29 Car. II. c. 7. By 29 Car. II. c. 7, no arrest can be made, nor process served, on a Sunday, except for treason, felony, or breach of the peace. *Ante* vol. iii. 290. Where by the contrivance of plaintiff's attorney, a party had been arrested on a Sunday on criminal process, for the purpose of affecting his arrest on civil process, and was detained in custody till Monday, and then arrested on the civil process, the court of King's Bench ordered him to be discharged out of custody. *Wells v. Gurney*, 8 B. & C. 769. Neither is the hundred answerable to the party robbed, for a robbery committed on a Sunday. But where a plaintiff was robbed in going to his parish church, in his coach, on a Sunday, he recovered against the hundred, under the statute of Winton, 13 Edw. I. st. 2, the court observing, that the statute of Charles must be construed to extend only to cases of travelling, and that it might have been otherwise if the plaintiff had been making visits, or the like. *Teshmaker v. the Hundred of Edmonton*, M. 7 Geo. I. See 1, Stra. 406; Com. 345. But the hundred is not now liable at all; 7 & 8 Geo. IV. c. 31. Killing game on a Sunday is prohibited, under heavy penalties, by 1 & 2 W. 4, c. 32. See 3 Chitty's Burn, title Lord's Day, 657, 2 Chitty's Statutes, title Sunday, 1036.

(26) Vide *ante* 26, note (5).

stocks (27): by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbours. And there are many wholesome statutes by way of prevention, chiefly passed in the same reign of king James I., which regulate the licensing of alehouses, and punish persons found tippling therein; or the master of such houses permitting them (28) (29).

Lewdness an offence against God and religion. Adultery cognizable by law only as a private injury.

XI. The last offence which I shall mention, more immediately against religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdness*, either by frequenting houses of ill fame, which is an indictable offence (t) (30): or by some grossly scandalous and public indecency, for which the punishment is by fine and imprison-

(t) Poph. 208.

(27) That is, if he is not able to pay the penalty of 5s.

(28) Justices of the peace have an absolute and uncontrolled power and discretion in granting and refusing ale-licences; but if it should appear from their own declarations, or the circumstances of their conduct, that they have either refused or granted a licence from a partial or corrupt motive, they are punishable in the court of King's Bench by information, or they may be prosecuted by indictment. 1 Burr. 556; 1 T. R. 692.—CH.*

(29) The principal statutes now in force upon this subject are the 9 Geo. IV. c. 61, and 1 W. IV. c. 64, too long for insertion, even in an abridged shape. See them at length, with other statutes, in 1 Chitty's Burn, title Alehouses, 56.

As to what fees shall be taken upon

granting licences, see *Morgan v. Palmer*, 4 D. & R. 283; 2 B. & C. 729.

(30) The bare solicitation of chastity is not indictable; and a woman cannot be indicted, therefore, for being a bawd generally; Hawk. C. I. s. 74; *Regina v. Pierson*, 1 Salk. 382. But keeping a house of ill fame, and encouraging disorderly persons to frequent it, is an indictable offence; Hawk. C. I. s. 74. And a lodger, using one room for such purposes would be indictable, the same as if she owned the whole house; *Regina v. Pierson*, 2 Lord Raym. 1197; 1 Salk. 382. A married woman may be indicted, with or without her husband for this offence; *Regina v. Williams*, 1 Salk. 384, *ante* 29 in notis. And see Dr. Hussey's Case, Hob. 95, where husband and wife were indicted for the ravishment of a ward, and the wife

* But the court of King's Bench refused a mandamus to justices to rehear an application for an alehouse licence, which they had refused, though it was suggested that their refusal had proceeded from a mistaken view of their jurisdiction. *Rex v. Farringdon Without (Justices)*, 4 D. & R. 735. So,

they refused a mandamus to rehear a similar application, at any other period of the year than within the first twenty days of September, though the justices might have refused the licence under a mistake of the law. *Rex v. Surrey (Justices)*, 5 D. & R. 308.

ment (u) (31). In the year 1650, when the ruling power found it for their interest to put on the semblance of a very

(u) 1 Siderf. 168.

alone found guilty. By the 25 Geo. II. c. 36, § 5, constables are compellable to prosecute persons keeping bawdy-houses. By the 58 Geo. III. c. 70, § 7, overseers are required to perform that duty. By 3 Geo. IV. c. 114, the keeping a bawdy-house is made punishable with hard labour and imprisonment, instead of, or in addition to, other punishment. And by 5 Geo. IV. c. 83, § 4, exposing a man's person with intent to insult a female, is punishable with imprisonment; and by § 3, common prostitutes behaving in a publicly indecent manner, are liable to imprisonment.

(31) Many offences of the incontinent kind fall properly under the jurisdiction of the ecclesiastical court, and are appropriated to it. But except those appropriated cases, the court of King's Bench is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*; 3 Burr. 1438. In that court, in the reign of Charles the Second, Sir Charles Sedley was indicted for exposing himself naked in a balcony in Covent-garden, and the court declared it was the *custos morum* of all the king's subjects; and it was determined to punish such profane actions, which were so contrary to good manners as well as christianity; but, in consideration that he was a gentleman of a very ancient family and his estate incumbered, and as it did not wish his ruin but his reformation, the judgment of the court was only that he should pay a fine of 2000 marks, be imprisoned a week, and bound to his good behaviour for three years; 1 Sid.

168. An information has been granted against a number of persons concerned in assigning a young girl as an apprentice to a gentleman under pretence of learning music, but for the purposes of prostitution; 3 Burr. 1438. There is also an instance of an information for a conspiracy against a peer and several others for enticing away a young lady from her father's house, and procuring her seduction. The young lady was the sister of his wife. That circumstance was undoubtedly a great aggravation of the offence, yet its existence in the case was not necessary to give the court cognizance of the prosecution; 3 St. Tr. 519. In a case, where a husband had formally assigned his wife over to another man, Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners; 3 Burr. 1438. It is extraordinary that prosecutions are not instituted against those who publicly sell their wives, and against those who buy them. Such a practice is shameful and scandalous in itself, and encourages other acts of criminality and wickedness. It now prevails to a degree, that the punishment of some, convicted of this offence, by exposure in the pillory would afford a salutary example. All such acts of indecency and immorality are public misdemeanors, and the offenders may be punished either by an information granted by the court of King's Bench, or by an indictment preferred before a grand jury at the assizes or quarter sessions.—CH.*

* The offence of buying and selling a wife is unquestionably a misdemeanor at common law, and an indictment against all the parties concerned in a

transaction of that nature has been recently prosecuted to conviction at one of our courts of quarter sessions. Either party marrying again, during the life

[*65]

extraordinary strictness and purity of morals, not only incest and wilful adultery were made capital crimes, but also the repeated act of keeping a brothel, or committing fornication, were, upon a second conviction, made felony without benefit of clergy (*w*). But at the restoration, when men, from an abhorrence of the hypocrisy of the late times, fell into a contrary extreme of licentiousness, it was not thought proper to renew a law of *such unfashionable rigour. And these offences have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the constrained celibacy of its first compilers. The temporal courts, therefore, take no cognizance of the crime of adultery, otherwise than as a private injury (*x*).

The having
bastard children
a branch of the
last mentioned
offence.

But, before we quit this subject, we must take notice of the temporal punishment for having *bastard children*, considered in a criminal light; for with regard to the maintenance of such illegitimate offspring, which is a civil concern, we have formerly spoken at large (*y*). By the statute 18 Eliz. c. 3, two justices may take order for the punishment of the mother and reputed father; but what that punishment shall be is not therein ascertained; though the contemporary exposition was, that a corporal punishment was intended (*z*). By statute 7 Jac. I. c. 4, a specific punishment, viz. commitment to the house of correction, is inflicted on the woman only. But in both cases, it seems that the penalty can only be inflicted, if the bastard becomes chargeable to the parish; for otherwise the very maintenance of the child is considered as a degree of punishment. By the last-mentioned statute the justices may commit the mother to the house of correction, there to be punished and set on work for one year; and, in case of a second offence, till she find sureties never to offend again (32).

(*w*) Scobell, 121.

(*x*) See vol. III. p. 139.

(*y*) See vol. I. p. 458.

(*z*) Dalt. Just. ch. 11.

of the other, after a separation thus illegally effected, would, it seems, be guilty of bigamy; for it has been held that, after a divorce *à mensâ et toro*, as the

marriage continues, marrying again, while either party is living, is bigamy; *Porter's case*, Cro. Car. 461.

(32) By the Poor Law Amendment

Act, 4 & 5 W. IV. c. 76, § 69, all statutes relating to the affiliation of bastards born after the passing of that Act, and to the punishment of the mother or putative father, are repealed.

By sect. 70, all securities and recognizances to indemnify parishes against children likely to be born bastards are declared null and void; and all persons in custody for not giving indemnity shall be discharged.

By sect. 71, bastards shall follow the settlement of their mothers until the age of sixteen; and the mother of a bastard child, while unmarried or a widow, shall maintain it until the age of sixteen.

By sect. 72, if the mother of a bastard child is not able to maintain it, and it thereby becomes chargeable, the sessions, after notice to the putative father, may make an order upon him to reimburse the parish for its maintenance until it is seven years old; but no such order shall be made unless the evidence of the mother is corroborated in some material particular by other testimony; and no part of the money paid by the putative father shall be applied to the maintenance of the mother.

By sect. 73, no application for such order shall be heard unless fourteen days' previous notice has been or shall have been given to the putative father; where the application is granted, the costs of maintenance shall be calculated from the birth of the child, if within six months; where the application is refused, the costs of the putative father shall be paid by the parish.

By sect. 74, if the putative father does not appear, pursuant to notice, the sessions may hear the case in his absence.

By sect. 75, the putative father may be summoned before a magistrate, and, if suspected of intending to abscond,

may be required to enter into a recognizance for his appearance at the sessions; and on refusing may be committed.

By sect. 76, if payments ordered to be made by the putative father get into arrear, he may be proceeded against by distress of goods or attachment of wages:

And by sect. 57, every man who from and after the passing of this Act shall marry a woman having a child or children at the time of such marriage, *whether such child or children be legitimate or illegitimate*, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children, until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this Act, be deemed a part of such husband's family accordingly.

"The effect of this clause," says Mr. Archbold, in his edition of the Statute, p. 93, n. (41), "is to render the husband punishable under the Vagrant Act, as an idle and disorderly person, if he refuse to support the wife's children. Before this statute a husband was not bound to maintain the illegitimate children of his wife by another man. As to her legitimate children, it was at one time holden that he was bound to provide for them; *Rex v. St. Botolph's, Aldgate*, Foley, 42; *Rex v. Clentham*, Foley, 39. But all the more modern cases are otherwise; *Rex v. Benoite*, 1 Bott. 379; case of *Woodford and Lilburn*, *Ibid*; *Tubb v. Henison*, 4 T. R., 118; *Cooper v. Martin*, 4 East, 76."

CHAPTER V.

OF OFFENCES AGAINST THE LAW OF NATIONS.

Offences against the law of nations cognizable by the English law.

ACCORDING to the method marked out in the preceding chapter, we are next to consider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another; those, I mean, which are particularly animadverted on, as such, by the English law.

The law of nations must be construed by the law of nature and reason.

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world (*a*); in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each (*b*). This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests (*c*). And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those *principles of natural justice, in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

[*67]

The law of nations is part of the law of the land: and the statutes enforcing it, are mere-

In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since, in England, no royal

(*a*) Ff. 1, 1, 9.

(*c*) Sp. L. b. 1, c. 7.

(*b*) See vol. I. page 43.

power can introduce a new law, or suspend the execution of the old, therefore the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom: without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law merchant (*d*), which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of (1).

But, though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England: yet the present branch of our inquiries will fall *within a narrow compass, as offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations; in which case recourse can only be had to war; which is an appeal to the God of hosts, to punish such infractions of public faith, as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then

Offences against the law of nations are cognizable by the municipal law, only when committed by private subjects;

[*68]

(*d*) See vol. I. page 273.

(1) By the 33 Geo. III. c. 66, it was enacted, that it was unlawful for any of his Majesty's subjects to ransom, or enter into any contract for ransoming, any ship or merchandize captured by an enemy; and that all contracts

and securities for that purpose were absolutely void; and that every person who entered into such a contract, should be subject to a penalty of 500*l*. —CH.

the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is, therefore, incumbent upon the nation injured, first to demand satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then allows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

as 1. violation of safe-conducts; 2. Infringement of the rights of ambassadors; 3. Piracy.

1. Violation of safe-conducts, prohibited by magna charta, and punishable by subsequent statutes.

The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy.

I. As to the first, *violation of safe-conducts or passports*, expressly granted by the king or his ambassadors (*e*) to the subjects of a foreign power in time of mutual war: or committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct: these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offences may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of *the foreign prince to cause justice to be done to his subject by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law: and, more especially, as it is one of the articles of *magna charta* (*f*), that foreign merchants should be entitled to safe-conduct and security throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honour is more particularly engaged in supporting his own safe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into

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(*e*) See vol. I. page 260.

page 259, &c.

(*f*) 9 Hen. III. c. 70. See vol. I.

general hostilities, by the statute 2 Hen V. st. 1, c. 6, breaking of truce and safe-conducts, or abetting and receiving the truce-breakers, was, in affirmance and support of the law of nations, declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and empowered to hear and determine such treasons, when committed at sea, according to the ancient marine law then practised in the admiral's court; and, together with two men learned in the law of the land, to hear and determine according to that law the same treasons, when committed within the body of any county. Which statute, so far as it made these offences amount to treason, was suspended by 14 Hen. VI. c. 8, and repealed by 20 Hen. VI. c. 11, but revived by 29 Hen. VI. c. 2, which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the crown. And it is further enacted by the statute 31 Hen. VI. c. 4, that if any of the king's subjects attempt or offend, upon the sea, or in any port within the king's obeisance, against any stranger in amity, league, or truce, or under safe-conduct; and especially by attaching *his person, or spoiling him or robbing him of his goods; the lord chancellor, with any of the justices of either the King's Bench, or Common Pleas, may cause full restitution and amends to be made to the party injured.

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It is to be observed, that the suspending and repealing Acts of 14 and 20 Hen. VI., and also the reviving Act of 29 Hen. VI., were only temporary; so that it should seem that, after the expiration of them all, the statute 2 Hen. V. continued in full force: but yet it is considered as extinct by the statute 14 Edw. IV. c. 4, which revives and confirms all statutes and ordinances, made before the accession of the house of York, against breakers of amities, truces, leagues, and safe-conducts, with an express exception to the statute of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general statutes of Edward VI. and queen Mary, for abolishing new-created treasons; though Sir Matthew Hale seems to question it as to treasons com-

Some of those
statutes were
only temporary.

mitted on the sea (g). But certainly the statute of 31 Hen. VI. remains in full force to this day.

2. Infringement of the rights of ambassadors is punishable at the discretion of the three principal judges.

II. As to the rights of *ambassadors*, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large (h). It may here be sufficient to remark, that the common law of England recognizes them in their full extent, by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister or any of his train. And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared by the statute 7 Ann. c 12, that all process whereby the person of any ambassador (2), or of his domestic or domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void (3); and that all per-

(g) 1 Hal. P. C. 267.

(h) See vol. I. page 253.

(2) "Or other public minister of a foreign prince or state."

(3) Where a British born subject employed as first chorister at the Portuguese ambassador's chapel, with a salary, rented and occupied a house, and let part of it in lodgings, and a distress was levied on his goods for a poor rate; it was held, that his goods were not protected by 7 Anne, c. 12, assuming him to be a domestic servant of the ambassador; *Novello v. Toogood*, 2 D. & R. 833; 1 B. & C. 554. So, where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the court of King's Bench refused to quash the writ, though the husband swore, that before, and at the time of the arrest, he was in the actual employment of the ambassador, and in daily attendance upon him, in writing despatches and other official documents; *English v. Caballero*, 3 D. & R. 25.

See also, 1 Hawk. P. C. p. 8, § 5. A consul is not considered as a public minister, nor consequently privileged from arrest; Tidd, 197, and the cases

there collected. A person claiming privilege as a servant to an ambassador must be really, and *bonâ fide*, his menial and domestic servant at the time of the arrest; *Flint v. De Loyant*, 1 Tidd, 193; *Heathfield v. Chilton*, 4 Burr. 2015; *Poitier v. Croza*, 1 W. Bl. 48. He must also shew the nature of his service, and swear to the actual performance of it; *Fontainer v. Heyl*, 3 Burr. 1731. A land waiter at the Custom House cannot claim protection as such domestic servant; *Masters v. Manby*, 1 Burr. 401. Privilege from arrest was denied to the domestic physician of a public foreign minister, where it appeared to be a mere scheme to screen him from his debts; *Lockwood v. Coysgarne*, 3 Burr. 1676. The chaplain of an ambassador is not protected from arrest, if he performs no duty in the house; *Seacomb v. Bowlney*, 1 Wils. 20. Neither is the interpreter of an ambassador if he does not live in the house, *Carolino's case*, 1 Wils. 78. The English secretary of an ambassador was denied protection, because it appeared that he was purser of a ship

sons prosecuting, soliciting, or executing such process, being convicted by confession or the oath of one witness, before the *lord chancellor and the chief justices, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think fit (i). Thus, in cases of extraordinary outrage, for which the law hath provided no special penalty, the legislature hath intrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

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III. Lastly, the crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke (k), *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

3. Piracy. A pirate is the enemy of all mankind, and punishable by every government.

By the ancient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien to be felony only: but now, since the statute of treasons, 25 Edw. III. c. 2, it is held to be only felony in a subject (l). Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law (m). But, it being inconsistent with the liberties of the nation, that any man's life should be

Piracy was anciently deemed treason in a subject, and felony in an alien, by the common law.

(i) See the occasion of making this statute, vol. I. page 255.

(k) 3 Inst. 113.

(l) Ibid.

(m) 1 Hawk. P. C. 98.

of war; *Durling v. Atkins*, 3 Wils. 33. In another case, however, protection was allowed, though the party had formerly been a trader, and though the case arose under very suspicious circumstances; *Triquet v. Bath*, 3 Burr. 1478; 1 W. Bl. 471. The secretary

of a foreign minister is privileged from arrest, though his name be not registered at the office of either of the secretaries of state; *Hopkins v. De Roebuck*, 3 T. R. 79. See Tidd, 198, 1 Chitty's Collection of Statutes, 13 note (a). Post, 441.

taken away, unless by the judgment of his peers, or the common law of the land, the statute 28 Hen. VIII. c. 15, established a new jurisdiction for this purpose ; which proceeds according to the course of the common law, and of which we shall say more hereafter (4).

[*72]
Is now felony by
various statutes.

*The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there (*n*). But, by statute, some other offences are made piracy also ; as, by statute 11 and 12 W. III. c. 7, if any natural born subject commits any act of hostility upon

(*n*) 1 Hawk. P. C. 100.

(4) By statute 39 Geo. III. c. 37, all offences committed upon the high seas shall be inquired of, &c. in like manner as treasons, &c. are directed to be by the statute 28 Hen. VIII. c. 15; and similar provisions are contained in the statutes 7 & 8 Geo. IV. c. 29; 7 & 8 Geo. IV. c. 30; 9 Geo. IV. c. 31; and 11 Geo. IV. & 1 W. IV. c. 66, with respect to the trial of offences within those acts respectively, committed within the jurisdiction of the Admiralty.

All offences, therefore, which come under the general denomination of piracy, are inquired of, tried, and determined before the judge of the Admiralty court, and two of the judges of the common law courts, under a commission of oyer and terminer; and in the indictment, no county is inserted in the margin as venue, but, instead of it, merely the words "Admiralty of England;" Archb. Cr. Pl. 22-3.

The offence must be proved to have been committed within the jurisdiction of the court of Admiralty; that is, upon some part of the sea not within the body of a county. All rivers in this country, until they flow past the farthest point of land next the sea, are within the jurisdiction of the common law courts, and not of the court of Admiralty; 1 Rol. R. 175; 3 Inst. 113; 3 T. R. 315. Nor does the Admiralty

jurisdiction extend to any haven, creek, arm of the sea, or other place within the body of a county; 3 Inst. 113; 1 Hawk. c. 37, § 11. Thus, where the sea flows in between two points of land in this country, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction over all offences committed within that limit; the court of Admiralty over all committed without it. See, however, *Bruce's case*, 2 Leach, 1093; 1 East's P. C. 368; R. & R. C. C. 243. But if a robbery is committed in creeks, harbours, ports, &c. in foreign countries, the court of Admiralty has jurisdiction over it, and such offence is, consequently, piracy. *Rex v. Jemot*, Comb. Cr. Pl. 233. Of offences committed on the coasts, beyond the low water mark, the Admiralty have exclusive jurisdiction; and between that and the high water mark, the court of Admiralty has jurisdiction of offences done on the water when the tide is in, and the courts of common law of offences committed upon the strand when the tide is out. All the other parts of the high sea are indisputably within the jurisdiction of the court of Admiralty. Matth. Dig. 13, 14; Archb. Cr. Pl. 232, 233.

See further and fully upon this subject, "High Court of Admiralty, *post*, 268."

the high seas, against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And further, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts: or any person assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board; shall, for each of these offences, be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal, or merely accessory by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And the statute 4 Geo. I. c. 11, expressly excludes the principals from the benefit of clergy. By the statute 8 Geo. I. c. 24, the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard; shall be deemed piracy: and such accessories to piracy as are described by the statute of king William, are declared to be principal pirates, and all pirates convicted by virtue of this Act are made felons without benefit of clergy. By the same statutes also, to encourage the defence of merchant vessels against pirates, the commanders or seamen wounded, and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to *be divided among them, not exceeding one fiftieth part of the value of the cargo on board: and such wounded seamen shall be entitled to the pension of Greenwich hospital; which no other seamen are, except such only as have served in a ship of war. And if the commander shall behave cowardly, by not defending the ship, if she carries guns or arms, or shall discharge the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months' imprisonment. Lastly, by statute 18 Geo. II. c. 30, any natural born subject, or denizen, who in time of war shall commit hostilities at sea against any of his fellow subjects, or shall

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assist an enemy on that element, is liable to be tried and convicted as a pirate (5).

These are the principal cases, in which the statute law of England interposes, to aid and enforce the law of nations as a part of the common law; by inflicting an adequate punishment upon offences against that universal law, committed by private persons. We shall proceed in the next chapter to consider offences, which more immediately affect the sovereign executive power of our own particular state, or the king and government; which species of crimes branches itself into a much larger extent, than either of those of which we have already treated.

(5) See 2 Hawk. P. C. p. 305, 461-5, 480, § 1. See also 5 Geo. IV. c. 17, by which dealing in slaves on the high seas, &c. is made piracy, and punishable with death. See also 5 Geo. IV. c. 113, § 9, and *Forbes v. Cochrane*, 3 D. & R. 679; 2 B. & C. 448, on the same subject. See also 9 G. IV. c. 84, "An act to continue an act (5 Geo. IV. c. 17.) for amending and consolidating the laws relating to the abolition of the slave trade."

The 9 Geo. IV. c. 31, repeals so much of the 22 & 23 Car. II. c. 11,

"as relates to any mariner laying violent hands on his commander as therein mentioned."

Piratically stealing a ship's anchor and cable, is a capital offence by the marine laws, triable under the 28 Hen. VIII. c. 15, as the 39 Geo. III. c. 37, does not extend to that case, and the stealing is equally an offence, though the master of the vessel concur in it, and though the object is to defraud the underwriters, not the owners; *Rex v. Curling*, R. & R. C. C. 123.

CHAPTER VI. OF HIGH TREASON.

THE third general division of crimes consists of such as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign. In a former part of these commentaries (a) we had occasion to mention the nature of allegiance, as the tie or *ligamen* which binds every subject to be true and faithful to his sovereign *liege* lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was distinguished into two species: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens also. Every offence therefore more immediately affecting the royal person, his crown or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by residence: and these may be distinguished into four kinds; 1. Treason. 2. Felonies injurious to the king's prerogative. 3. *Præmunire*. 4. Other misprisions and contempts. Of which crimes the first and principal is that of treason.

Offences against the king and his government, consist either in a renunciation of allegiance, or a neglect of duty; may be committed either by subjects or aliens; and are 1. Treason. 2. Felonies injurious to the prerogative. 3. *Præmunire*. 4. Misprisions and contempts.

*Treason, *proditio*, in its very name, which is borrowed from the French, imports a betraying, treachery, or breach of faith. It therefore happens only between allies, saith the Mirror (b): for treason is indeed a general appellation, made use of by the law, to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a

[*75]
Treason is
breach of faith.

(a) Book I. ch. 10.

(b) C. 1, § 7.

subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord (c). This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours it to have conspired in public against his liege lord and sovereign: and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these, being breaches of the lower allegiance, of private and domestic faith, are denominated *petit* treasons (1). But when disloyalty so rears its crest, as to attack even majesty itself, it is called by way of eminent distinction *high* treason, *alta prodition*; being equivalent to the *crimen læsæ majestatis* of the Romans, as Glanvil (d) denominates it also in our English law.

Constructive treasons were tolerated by the common law. Treason, properly speaking, was first defined and divided into seven distinct branches, by 25 Edw. III. c. 2.

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As this is the highest civil crime which, considered as a member of the community, any man can possibly commit, it ought therefore to be the most precisely ascertained (2). For if the crime of high treason be indeterminate, this alone, says the president Montesquieu, is sufficient to make any government degenerate into arbitrary power (e). And yet, by the ancient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offences into *the crime and punishment of treason, which never were suspected to be such. Thus the *accroaching*, or attempting to exercise, royal power, a very uncertain charge, was in the 21 Edw. III. held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.* (f): a crime, it must be owned, well deserving of punishment: but which seems to be of a complexion very

(c) LL. Ælfredi. c. 4; Æthelst. c. 4; Canuti c. 54, 61.
(d) L. 1, c. 2.

(e) Sp. L. b. 12, c. 7.
(f) 1 Hal. P. C. 80.

(1) All now abolished by 9 Geo. IV. c. 31, § 2. See *ante* 16, note (10).

(2) This may be the reason also for

the peculiar privileges and indulgences allowed by law to prisoners under trial for this charge. See *post* 351.

different from that of treason. Killing the king's father, or brother, or even his messenger, has also fallen under the same denomination (*g*). The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason (*h*). But, however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2, was made; which defines what offences only, for the future, should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Cæsar, comprehended all the ancient laws that had before been enacted to punish transgressors against the state (*i*). This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches (3).

1. "When a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir." Under this description it is held that a queen regnant, such as queen Elizabeth and queen Anne, is within the words of the Act, being invested with royal power and entitled to the allegiance of her subjects (*j*): but the husband of such a queen is not comprised within these words, *and therefore no treason can be committed against him (*k*). The king here intended is the king in possession, without any re-

1. Compassing or imagining the death of the king, the queen consort, or their eldest son and heir. This includes a queen regnant, but not her consort. It may be against the king in possession, whether *de jure*, or *de facto*; but can-
[*77]

(*g*) Britt. c. 22; 1 Hawk. P. C. 34.

(*h*) *Qui de nece virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet postremo, qui militat nobiscum, cogitaverit: (eâdem enim severitate voluntatem sceleris, quâ effectum, puniri jura voluerint) ipse quidem, utpote majestatis reus, gladio feriat, bonis ejus omnibus fisco nostro addictis.* (Cod. 9, 8, 5.)—"Whoever plots the death of any of those illustrious men who share in our coun-

sels and constitution, or of any of our senators (for they also are a part of our own person), or, lastly, of any man who is in alliance with us (for the laws have decreed the same severity of punishment for the attempt, as for the completion of such crimes), shall be deemed guilty of treason, and shall suffer death and confiscation of all his goods."

(*i*) Gravin. Orig. 1, § 34.

(*j*) 1 Hal. P. C. 101.

(*k*) 3 Inst. 7; 1 Hal. P. C. 106.

(3) The 25 Edw. III. c. 2, was continued by 36 Geo. III. c. 7, which

was made perpetual by 57 Geo. III. c. 6, see *post*, 92.

not be against
the king when
he has resigned
or abdicated.

spect to his title : for it is held, that a king *de facto* and not *de jure*, or in other words an usurper that hath got possession of the throne, is a king within the meaning of the statute ; as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public : and therefore treasons committed against Henry VI. were punished under Edward IV. though all the line of Lancaster had been previously declared usurpers by Act of Parliament. But the most rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute against whom treasons may be committed (*l*). And a very sensible writer on the crown law carries the point of possession so far, that he holds (*m*), that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. VII. c. 1, which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto*. But in truth, this seems to be confounding all notions of right and wrong ; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power, though not the name, of king, the people were bound in duty to hinder the son's restoration ; and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown, a term, by the way, of very loose and indistinct signification, the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry *the seventh does by no means *command* any opposition to a king *de jure* ; but *excuses* the obedience paid to a king *de facto*. When therefore a usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance : otherwise, under a usurpation, no man could be safe ; if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly

[*78]

(*l*) 3 Inst. 7 ; 1 Hal. P. C. 104.

(*m*) 1 Hawk. P. C. 36.

do for disobedience. Nay further, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim: and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is according to Sir Matthew Hale no longer the object of treason (*n*). And the same reason holds, in case a king abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, as was formerly observed (*o*), when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer king.

Let us next see, what is a *compassing* or *imagining* the death of the king, &c. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will (*p*), and not, as in common speech, the carrying such design to effect (*q*). And therefore an accidental stroke, which may mortally wound the sovereign, *per infortunium*, without any traitorous intent, is no treason: as was the case of Sir Walter Tyrrel, who, by the command of king William Rufus, *shooting at a hart, the arrow glanced against a tree, and killed the king upon the spot (*r*). But, as this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt*, act (4) (5). And yet the

Compassing and imagining are synonymous terms, and must be expressed by an overt act.

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(*n*) 1 Hal. P. C. 104.

(*o*) Vol. I. page 212.

(*p*) By the ancient law *compassing* or intending the death of any man, demonstrated by some evident fact, was

equally penal as homicide itself; (3 Inst. 5.)

(*q*) 1 Hal. P. C. 107.

(*r*) 3 Inst. 6.

(4) In the case of the regicides, the indictment charged, that they did traitorously compass and imagine the death of the king. And the taking off his head was laid, among others, as an

overt act of compassing. And the person who was supposed to have given the stroke was convicted on the same indictment.

For the compassing is considered as

tyrant Dionysius is recorded (*s*) to have executed a subject barely for dreaming that he had killed him; which was held for sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon. The statute expressly requires, that the accused “be thereof, upon sufficient proof, attainted of some open act by men of his own condition.” Thus, to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason in imagining his death (*t*). To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king’s death (*u*); for all force, used to the person of the king, in its consequence, may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign; it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason (*w*) (6).

(*s*) Plutarch. *in vit.*

(*t*) 3 Inst. 12.

(*u*) 1 Hal. P. C. 109.

(*w*) 1 Hawk. P. C. 38; 1 Hal. P. C.

119.

the treason, the overt acts as the means made use of to effectuate the intention of the heart.

And in every indictment for this species of treason, and indeed for levying war, or adhering to the king’s enemies, an overt act must be alleged and proved. For the overt act is the charge, to which the prisoner must apply his defence. But it is not necessary, that the whole of the evidence intended to be given should be set forth; the common law never required this exactness, nor doth the statute of king William require it. It is sufficient, that the charge be reduced to a reasonable certainty, so

that the defendant may be apprized of the nature of it, and prepared to give an answer to it; Fost. 194.—CH.

(5) To sustain an indictment for high treason, it seems absolutely necessary that an overt act should be alleged and proved, and by the oath of two witnesses; 7 W. III. c. 3.

(6) This subject is so ably explained by Mr. Justice Foster in his first discourse on high treason, that I think it may be useful to annex here two of his sections.

In the case of the king, the statute of treasons hath, with great propriety, retained the rule *voluntas pro facto*. The

How far mere *words*, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances in the reign of Edward the fourth, *of persons executed for treasonable words: the one a citizen of London, who said he would make his son heir of the crown, being the sign of the house in which he lived; the other a gentleman, whose favourite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly (7). These were esteemed hard cases: and the Chief Justice Markham rather chose to leave his place than assent

Mere words do not amount to an overt act of treason, whether spoken or written;—whether the publication of written words does, quære.

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principle upon which this is founded is too obvious to need much enlargement. The king is considered as the head of the body politic, and the members of that body are considered as united and kept together by a political union with him and with each other. His life cannot, in the ordinary course of things, be taken away by treasonable practices, without involving a whole nation in blood and confusion; consequently every stroke levelled at his person is, in the ordinary course of things, levelled at the public tranquillity. The law, therefore, tendereth the safety of the king with an anxious concern, and, if I may use the expression, with a concern bordering upon jealousy. It considereth the wicked imaginations of the heart in the same degree of guilt as if carried into actual execution from the moment measures appear to have been taken to render them effectual. And, therefore, if conspirators meet and consult how to kill the king, though they do not then fall upon any scheme for that purpose, this is an overt act of compassing his death; and so are all means made use of, be it advice, persuasion, or command, to incite or encourage others to commit the fact, or join in the attempt; and every person who but assenteth to any overtures for that purpose will be involved in the same guilt.

The care the law hath taken for the

personal safety of the king is not confined to actions or attempts of the more flagitious kind, to assassination or poison, or other attempts directly and immediately aiming at his life. It is extended to every thing wilfully and deliberately done or attempted, whereby his life may be endangered. And, therefore, the entering into measures for deposing or imprisoning him, or to get his person into the power of the conspirators, these offences are overt acts of treason within this branch of the statute. For experience has shewn that between the prisons and the graves of princes the distance is very small; Fost. 194.

This was the species of treason with which the state prisoners were charged, who were tried in 1794. And the question, as stated by the court for the jury to try, was, Whether their measures had been entered into with an intent to subvert the monarchy and to depose the king? See Hardy's trial —CH.

(7) There was even a refinement and degree of subtlety in the cruelty of that case, for he wished it, horns and all, in the belly of him who counselled the king to kill it; and as the king killed it of his own accord, or was his own counsellor, it was held to be a treasonable wish against the king himself. 1 Hal. P. C. 115.—CH.

to the latter judgment (*x*). But it now seems clearly to be agreed, that, by the common law and the statute of Edward III. words spoken amount only to a high misdemeanour, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or misremembered by the hearers; their meaning depends always on their connexion with other words, and things; they may signify differently even according to the tone of voice with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly in 4 Car. I. on a reference to all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, "that though the words were as wicked as might be, yet they were no treason: for, unless it be by some particular statute, no words will be treason (*y*) (8)." If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason; for *scribere est agere*. But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of one Peachum, a clergyman, for treasonable passages in a sermon never preached (*z*); and of Algernon Sydney, for some papers found in his closet; which had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt *acts of that treason, which was specially laid in the indictment (*a*). But being merely speculative, without any intention, so far as appeared,

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(*x*) 1 Hal. P. C. 115.(*y*) Cro. Car. 125.(*z*) Cro. Car. 125.(*a*) Foster, 198.

(8) This subject is fully and ably discussed by Mr. J. Foster, who maintains that words alone cannot amount to an overt act of treason; but if they are attended or followed by a consultation, meeting, or any act, then they will be evidence, or a confession of the

intent of such consultation, meeting, or act; and he concludes, that "loose words not relative to facts, are at the worst no more than bare indications of the malignity of the heart." Fost. 202, et seq.—CH.

of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peachum was therefore pardoned; and though Sydney indeed was executed, yet it was to the general discontent of the nation; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law (*b*); though of late even that has been questioned (*9*).

2. The second species of treason is, "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir." By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force, as with it: and this is high treason in both parties, if both be consenting; as some of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious: and therefore, when this reason ceases, the law ceases with it; for to violate a queen or princess dowager is held to be no treason (*c*) (*10*): in like manner as, by the feudal law, it was a felony and attended with a forfeiture of the fief, if the vassal vitiated the wife or daughter of his lord (*d*); but not so, if he only vitiated his widow (*e*).

2. Violating the king's companion, his eldest daughter, or the wife of his eldest son. Force is not necessary. Mutual consent constitutes treason by both parties. The object of this law is to secure the true succession to the crown.

(*b*) 1 Hal. P. C. 118. 1 Hawk P. C. 38.
(*c*) 3 Inst. 9.

(*d*) Feud. l. 1, t. 5.
(*e*) Ibid. t. 21.

(*9*) It appears that letters found in the possession of a person indicted for high treason, where they are proved to be in the prisoner's handwriting, may be read as evidence to substantiate an overt act of rebellion. 6 St. Tr. 63; Hawk. b. 2, c. 46, § 55; 1 Chit. C. L. 584. Intercepted letters to communicate treasonable intelligence to an enemy, may be read in evidence as overt acts of the treason respectively charged upon them. 6 St. Tr. 279; 4 Burn, 650; Hawk. b. 2, c. 46, § 56.

(*10*) But the instances specified in the statute do not prove much con-

sistency in the application of this reason; for there is no protection given to the wives of the younger sons of the king, though their issue must inherit the crown before the issue of the king's eldest daughter, and her chastity is only inviolable before marriage, whilst her children would be clearly illegitimate.

Before the 25 Edw. III. it was held to be high treason not only to violate the wife and daughters of the king, but also the nurses of his children, *les norices de l'our enfantz*. Britt. c. 8.—CH.

3. Levying war against the king in his realm. The object of the levying is immaterial. A mere conspiracy to levy war does not amount to this species of treason.

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3. The third species of treason is, "if a man do levy war against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended (*f*) (11). For the law does not, neither can it, permit *any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war: and so is an insurrection with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority (*g*). But a tumult with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this being no general defiance of public government. So, if two subjects quarrel and levy war against each other, (in that spirit of private war, which prevailed all over Europe (*h*) in the early feudal times,) it is only a great riot and contempt, and no treason. Thus it happened between the earls of Hereford and Gloucester in 20 Edw. I. who raised each a little army, and committed outrages upon each other's lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemeanour (*i*). A bare conspiracy to levy war does not amount to this species of treason; but, if particularly pointed at the person of the king or his government, it falls within the first, of compassing or imagining the king's death (*j*).

(*f*) 1 Hawk. P. C. 37.

(*i*) 1 Hal. P. C. 136.

(*g*) 1 Hal. P. C. 132.

(*j*) 3 Inst. 9; Foster, 211, 213.

(*h*) Robertson, Cha. V. i. 45, 286.

(11) Lord Mansfield declared, upon the trial of Lord George Gordon, that it was the unanimous opinion of the court, that an attempt, by intimidation

and violence, to force the repeal of a law, was a levying war against the king, and high treason. Doug. 570.—CH.

4. "If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence (12), by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the *like (*k*). By enemies are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving them any assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom (*l*), or else in that of levying war against his majesty. And, most indisputably, the same acts of adherence or aid, which, when applied to foreign enemies, will constitute treason under this branch of the statute, will, when afforded to our own fellow-subjects in actual rebellion at home, amount to high treason under the description of levying war against the king (*m*). But to relieve a rebel, fled out of the kingdom, is no treason: for the statute is taken strictly, and a rebel is not an *enemy*; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England (*n*). And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a safe opportunity (*o*).

4. Adherence to the king's enemies, which must be proved by an overt act. A rebel is not an enemy.

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(*k*) 3 Inst. 10.

(*l*) Foster, 219.

(*m*) Ibid. 216.

(*n*) 1 Hawk. P. C. 38.

(*o*) Foster, 216.

(12) Sending intelligence to the enemy of the destinations and designs of this kingdom, in order to assist them in their operations against us, or in defence of themselves, is high treason, although such correspondence should be intercepted. *Dr. Henley's case*, 1 Burr. 650.

The same doctrine was held by Lord Kenyon and the court in the

case of William Stone, who was tried at the bar of the court of King's Bench in Hilary term 1796. In that case it was held, that sending a paper to the enemy, though it was afterwards intercepted, containing advice not to invade this country, if sent with the intention of assisting their councils in their conduct and in the prosecution of the war, was high treason. 6 T. R. 527.—CH.

5. Counterfeiting the king's seal.

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6. Counterfeiting the king's money, or importing counterfeit money.

5. "If a man counterfeit the king's great or privy seal," this is also high treason. But if a man takes wax bearing the impression of the great seal off from one patent, and fixes it to another, this is held to be only an abuse of the seal, and not a counterfeiting of it: as was the case of a certain chaplain, who in such manner framed a dispensation for nonresidence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glewed together two pieces of parchment: on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the label going through both the skins. He *then dissolved the cement; and taking off the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and Sir Edward Coke (*p*) mentions it with some indignation, that the party was living at that day.

6. The sixth species of treason under this statute, is "if a man counterfeit the king's money; and if a man bring false money into the realm counterfeit to the money of England, knowing the money to be false, to merchandize and make payment withal." As to the first branch, counterfeiting the king's money: this is treason, whether the false money be uttered in payment or not. Also if the king's own minters alter the standard or alloy established by law, it is treason. But gold and silver money only are held to be within the statute (*q*). With regard likewise to the second branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the statute (*r*). But of this we shall presently say more (13).

(*p*) 3 Inst. 16.

(*q*) 1 Hawk. P. C. 42.

(*r*) Ibid. 43.

(13) The statute 25 Edw. III. c. 2, so far as relates to the coin of the realm, and all other statutes relating thereto, are repealed by the statute 2 W. IV. c. 24, which reduces the treason first mentioned above to a felony. The new statute does not however, alter the laws relating to foreign coin, nor does it extend to any part of his Majesty's dominions out of the united kingdom, except as to offences com-

mitted within the jurisdiction of the admiralty, with respect to which section 20, enacts, that where offences punishable under this act shall be committed within the jurisdiction of the admiralty, the same shall be dealt with, inquired into, tried, and determined in the same manner as any other offence committed within that jurisdiction. And see *post* 88, et seq.

7. The last species of treason ascertained by this statute, is "if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices." These high magistrates, as they represent the king's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not to wounding, or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the barons of the exchequer, as such, are not within the protection of this act (s): but the lord keeper or commissioners of the great seal now seem to be within it, by virtue of the statutes 5 Eliz. c. 18, and 1 W. and M. c. 21 (14).

7. Killing the king's chancellor, treasurer, or justices, in the execution of their offices. There must be an actual killing.

*Thus careful was the legislature, in the reign of Edward the third, to specify and reduce to a certainty the vague notions of treason, that had formerly prevailed in our courts. But the act does not stop here, but goes on. "Because other like cases of treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded, that if any other case supposed to be treason, which is not above specified, doth happen before any judge; the judge shall tarry without going to judgment of the treason, till the cause be shewed and declared before the king and his parliament, whether it ought to be judged treason, or other felony." Sir Matthew Hale (t) is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not suffering them to run out, upon their own opinions, into constructive treasons, though in cases that

The public are now secured against future constructive treasons.

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(s) 1 Hal. P. C. 231.

(t) Hal. P. C. 259.

(14) By the statute 7 Ann, c. 21, it is made high treason to slay any of the lords of session, or lords of judiciary, sitting in judgment; or to counterfeit the king's seals appointed by the act of union. This statute, 7 Ann, c. 21, has also enacted that the crimes of high treason and misprison of treason shall be exactly the same in England and Scotland; and that no acts in

Scotland, except those above specified, shall be construed high treason in Scotland, which is not high treason in England.

And all persons prosecuted in Scotland for high treason, or misprison of treason, shall be tried by a jury, and in the same manner as if they had been prosecuted for the same crime in England.—CH.

seem to them to have a like parity of reason; but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred act itself; and leaves a weighty *memento* to judges to be careful and not overhasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these *casus omissi* is reserved to the king and parliament, the most regular way to do it is by a new declarative act: and therefore the opinion of any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons.

New treasons were once introduced, but soon repealed.

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In consequence of this power, not indeed originally granted by the statute of Edward III. but constitutionally inherent in every subsequent parliament, which cannot be abridged of any rights by the act of a precedent one, the legislature was extremely liberal in declaring new treasons in the unfortunate reign of king Richard the second; as particularly, the killing of an ambassador was made so: *which seems to be founded upon better reason than the multitude of other points, that were then strained up to this high offence; the most arbitrary and absurd of all which was by the statute 21 Ric. II. c. 3, which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And in the first year of his successor's reign, an act was passed (*u*), reciting, "that no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason: and therefore it was accorded, that in no time to come any treason be judged, otherwise than was ordained by the statute of king Edward the third." This at once swept away the whole load of extravagant treasons introduced in the time of Richard the second.

Offences of this kind have been upon the whole increased, since the reign of Edward the third.

But afterwards, between the reign of Henry the fourth and queen Mary, and particularly in the bloody reign of Henry the eighth, the spirit of inventing new and strange treasons was revived: among which we may reckon the offences of

(*u*) Stat. 1 Hen. IV. c. 10.

clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilful poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign manual or signet; refusing to abjure the pope; deflowering or marrying, without the royal licence, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or *believing*, manifested by any overt act, the king to have been lawfully married to Anne of Cleve; derogating from the king's royal style and title; impugning his supremacy; and assembling riotously to the *number of twelve, and not dispersing upon proclamation: all which new-fangled treasons were totally abrogated by the statute 1 Mar. c. 1, which once more reduced all treasons to the standard of the statute 25 Edw. III. Since which time, though the legislature has been more cautious in creating new offences of this kind, yet the number is very considerably increased, as we shall find upon a short review (15).

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These new treasons, created since the statute 1 Mar. c. 1, and not comprehended under the description of statute 25 Edw. III. I shall comprise under three heads. 1. Such as relate to papists. 2. Such as relate to falsifying the coin or other royal signatures. 3. Such as are created for the security of the protestant succession in the house of Hanover.

Three kinds of new treasons are still unrepealed, relating,

1. The first species, relating to *papists*, was considered in a preceding chapter, among the penalties incurred by that branch of nonconformists to the national church; wherein we have only to remember, that by statute 5 Eliz. c. 1, to defend the pope's jurisdiction in this realm is, for the first time, a heavy misdemeanour: and, if the offence be repeated, it is high treason. Also by statute 27 Eliz. c. 2, if any popish priest, born in the dominions of the crown of England, shall come over hither from beyond the seas, unless driven by

1. To papists whose spiritual offences are made temporal ones also.

(15) The 1 Mar. c. 1, was only a confirmation so far of a much more important statute; viz. 1 Ed. VI. c. 12. —CH.

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stress of weather (*w*), and departing in a reasonable time (*x*); or shall tarry here three days without conforming to the church, and taking the oaths; he is guilty of high treason. And, by statute 3 Jac. I. c. 4, if any natural-born subject be withdrawn from his allegiance, and reconciled to the pope or see of Rome, or any other prince or state, both he and all such as procure such reconciliation shall incur the guilt of high treason. These were mentioned under the division before referred to, as spiritual offences, and I now repeat them as temporal ones also; the reason of distinguishing these overt acts of popery from all others, by setting the mark of high treason upon them, being certainly on a civil, and not on a religious, account. For every popish priest of course renounces his allegiance to his *temporal sovereign upon taking orders: that being inconsistent with his new engagements of canonical obedience to the pope: and the same may be said of an obstinate defence of his authority here, or a formal reconciliation to the see of Rome, which the statute construes to be a withdrawing from one's natural allegiance; and therefore, besides being reconciled "to the pope," it also adds "or any other prince or state."

2. To the coinage, or other signatures of the king.

2. With regard to treasons relative to the *coin* or other *royal signatures*, we may recollect that the only two offences respecting the coinage, which are made treason by the statute 25 Edw. III. are the actual counterfeiting the gold and silver coin of this kingdom; or the importing such counterfeit money with intent to utter it, knowing it to be false (16). But these

(*w*) Sir T. Raym. 377.

(*x*) Latch. 1.

(16) We have already seen, *ante* 84, n. (13), that the offence of counterfeiting the gold or silver coin of the realm is no longer treason, but a felony only. This was effected by the statute 2 W. IV. c. 24, which makes so many and important alterations in this branch of the law, that it seems desirable to notice its provisions somewhat at length:

By sect. 3, falsely making or counterfeiting any coin resembling, or intended to pass for, any of the king's current gold or silver coin, is felony, punishable with transportation for life, or for seven years, or by imprisonment for not more than four years.

The king's current gold or silver coin, is, by sect. 21, to be deemed to include and denote any gold or silver coin coined in any of his Majesty's mints, and lawfully current in any part of his Majesty's dominions, within the united kingdom and otherwise. Such coin will continue current until recalled, either by the king's proclamation or by act of parliament; 1 Hale, 212; 1 East, P. C. 148; though long disuse may be evidence from which to presume such recall; 1 East, P. C. 149. The offence of counterfeiting coin has been seldom established by direct and positive evidence; circumstantial evidence,

not being found sufficient to restrain the evil practice of coiners and false moneyers, other statutes have been since made for that purpose. The crime itself is made a species of high

such as might fairly warrant a jury in presuming that the defendant either counterfeited, or caused to be counterfeited, or was present aiding and assisting in counterfeiting, was always held sufficient to support an indictment under the repealed statute of 25 Ed. III. and will, it is presumed, be held sufficient still. So, it was held under the old law, that if several conspired to counterfeit the king's coin, and one of them actually did so in pursuance of the conspiracy, it was treason in all, and they might be indicted for counterfeiting the king's coin generally; 1 Hale, 214. A variance between the indictment and evidence, as to the number of pieces of coin alleged to be counterfeited, is immaterial; but a variance as to the denomination of such coin would be fatal; Archb. Cr. Pl. 222. The counterfeit coin must have such a resemblance to the real, that it would be likely to be received as genuine by persons using ordinary caution in taking money; *Ibid.* In *Varley's case*, 2 W. Bl. 882, the defendant had counterfeited a half guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition it then was; and the judges held the offence incomplete: however, by the new statute, sect. 3, the offence shall be deemed complete, though the coin counterfeited shall not be in a fit state to be uttered. A trifling variance from the real coin, in the inscription, &c. will not take a case out of the statute; nor the fact of the counterfeit coin being made of a different metal from the real, if washed or coloured so as to resemble it; 1 Hale, 215. Where the counterfeit coin was made to resemble the smooth-worn shillings then in circulation, without any impression whatever upon them, the case was held to be within the old statute; *Wilson's case*, 1 Leach, 285;

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Welch's case, 1 East, P. C. 164. By sect. 17, any credible witness may prove the fact of the coin being counterfeit.

By sect. 4, gilding, silvering, colouring, or washing any counterfeit coin, or filing, or in any manner altering, any lawful coin, is felony, punishable in like manner as the offences mentioned in sect. 3.

Preparing blanks of such materials as, when rubbed, will make them resemble the real coin, was held to be a colouring within the repealed statute 8 & 9 W. III. c. 26, before the resemblance has been produced by such friction; *Rex v. Case*, 1 East, P. C. 165; 1 Leach, 154, n. So, bringing to the surface the latent silver in a blank of mixed metal, by dipping it in aquafortis, was held to be a colouring within the same statute; *Rex v. Lavey*, 1 East, P. C. 166; 1 Leach, 140; and see *Rex v. Harris*, 1 Leach, 135. These decisions seem equally applicable to the present statute.

By sect. 5, impairing, diminishing, or lightening the current gold or silver coin, with intent to make the coin so impaired, &c. pass for the king's current gold or silver coin, is felony, punishable with transportation for seven or fourteen years, or imprisonment for not more than four years.

By sect. 6, buying, selling, receiving, paying, or putting off, or offering to buy, &c. counterfeit coin resembling or intended to pass for the current gold or silver coin, at a lower value than its denomination imports, and knowingly importing counterfeit coin, resembling or intended to pass for the current gold or silver coin, are felonies, punishable with transportation for life, or for seven years, or imprisonment for not more than four years.

Under the repealed statute 8 & 9 W. III. c. 26, where, on a bargain for the

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treason; as being a breach of allegiance, by infringing the king's prerogative, and assuming one of the attributes of the sovereign, to whom alone it belongs to set the value and denomination of coin made at home, or to fix the currency of foreign money: and besides, as all money which bears the stamp of the kingdom is sent into the world upon the public faith, as containing metal of a particular weight and standard, whoever falsifies this is an offender against the state, by contributing to render that public faith suspected. And upon the same reasons, by a law of the emperor Constantine (*y*), false coiners were declared guilty of high treason, and were condemned to be burnt alive: as, by the laws of Athens (*z*), all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment. However, it must be owned, that this method of reasoning is a little overstrained: counterfeiting or debasing the coin being usually practised, rather for the sake of private and unlawful lucre, than out of any disaffection to the sovereign. And *therefore both this and its kindred species of treason, that of counterfeiting the seals of the crown or other royal signatures, seem better denominated by the later civilians a branch of the *crimen falsi* or forgery, in which they are followed by Glanvil (*a*), Bracton (*b*), and Fleta (*c*), than by Constantine and our Edward

(*y*) C. 9, 24, 2; Cod. Theod. de falsa moneta, l. 9.

(*z*) Pott. Ant. b. 1, c. 26.

(*a*) L. 14, c. 7.

(*b*) L. 3, c. 3, § 1 & 2.

(*c*) L. 1, c. 22.

sale of counterfeit money, the price had been agreed upon, and the prisoner had produced the coin, but the complete transfer was prevented by the appearance of police officers, it was held that it did not amount to a putting off within the meaning of the Act; *Rex v. Woodridge*, 1 Leach, 307; 1 East, P. C. 179. This would not now be the case, as the present statute includes the offering to put off. The putting off must be proved as laid. An indictment on the 8 & 9 W. III. stated that five counterfeit shillings were paid and put off for two shillings. The proof was that five bad shillings were sold for half-a-crown. It was held that the variance was fatal, as it was a contract which must be correctly proved; *Rex v. Joyce*, Car. Cr. L. 184. But

where the indictment alleged that the prisoner put off a counterfeit sovereign and three counterfeit shillings for the sum of five shillings, and the proof was, that the prisoner said he would let the witness have a bad sovereign at five shillings, and three bad shillings at one shilling, and the witness paid for them with two good half crowns, it was held that such proof supported the indictment; *Rex v. Hodges*, 3 C. & P. 410. To support an indictment for putting off counterfeit milled money within the statute 8 & 9 W. III. it has been held unnecessary to prove that the counterfeit money was milled; *Rex v. Bunning*, 1 East, P. C. 180; 2 Leach, 621. All money now current being milled, the word "milled" is properly omitted in the present statute.

the third, a species of the *crimen læsæ majestatis* or high treason. For this confounds the distinction and proportion of offences; and, by affixing the same ideas of guilt upon the man who coins a leaden groat and him who assassinates his sovereign, takes off from that horror which ought to attend the very mention of the crime of high treason, and makes it more familiar to the subject. Before the statute 25 Edw. III. the offence of counterfeiting the coin was held to be only a species of petit treason (*d*); but subsequent acts in their new extensions of the offence have followed the example of that statute, and have made it equally high treason with an endeavour to subvert the government, though not quite equal in its punishment.

In consequence of the principle thus adopted, the statute 1 Mar. c. 1, having at one stroke repealed all intermediate treasons created since the 25 Edw. III. it was thought expedient by statute 1 Mar. st. 2, c. 6, to revive two species thereof; viz. 1. That if any person falsely forge or counterfeit any such kind of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the crown; or, 2. Shall falsely forge or counterfeit the sign manual, privy signet, or privy seal; such offences shall be deemed high treason. And by statute 1 and 2 P. and M. c. 11, if any persons do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, with intent to utter the same in payment, they shall be deemed offenders in high treason. The money referred to in these statutes must be such as is absolutely current here, in all payments, by the king's proclamation; of which there is none at present, Portugal money being only taken by consent, as approaching the nearest to our standard, *and falling in well enough with our divisions of money into pounds and shillings: therefore to counterfeit it is not high treason, but another inferior offence (16).

There are many statutes bearing upon this point.

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(*d*) 1 Hal. P. C. 224.

(16) By 37 Geo. III. c. 126, § 2, it is enacted, That if any person or persons shall coin, or counterfeit any description of coin, not permitted to be current within this kingdom, to re-

semble, or with intent to resemble, any foreign gold or silver coin, he or they shall be guilty of felony; and may be transported for any term not exceeding seven years. And if any person

Clipping or defacing the genuine coin was not hitherto included in these statutes: though an offence equally pernicious to trade, and an equal insult upon the prerogative, as well as personal affront to the sovereign; whose very image ought to be had in reverence by all loyal subjects. And therefore, among the Romans, (e) defacing or even melting down the emperor's statues was made treason by the Julian law; together with other offences of the like sort, according to that vague conclusion, "*aliudve quid simile si admiserint.*" And now, in England, by statute 5 Eliz. c. 11, clipping, washing, rounding, or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and by statute 18 Eliz. c. 1, (because "the same law, being penal, ought to be taken and expounded strictly according to the words thereof, and the like offences, not by any equity to receive the like punishment

(e) Ff. 48. 4, 6.

knowingly utter, or tender in payment, or pay any such counterfeit foreign coin, for the first offence he shall be imprisoned six months, and find sureties for six more; for the second offence, he shall be imprisoned two years; and, for the third, be guilty of a capital felony. By 43 Geo. III. c. 139, § 3, it is declared a misdemeanor to counterfeit any foreign coin, with intent to resemble any copper or other coin made of mixed metals, of less value than silver. The party offending may be imprisoned, on the first conviction, not exceeding one year, and, for a second transgression, shall be transported for seven years.

Persons having in their possession more than five pieces of false foreign coin, without some lawful excuse, may, on the oath of one witness before a magistrate, be convicted in the penalty of not more than 5*l.* and not less than 40*s.* and shall forfeit the base money.

A man and woman were indicted for uttering a bad shilling to M. B. they having another bad shilling in their possession at the time. The

uttering was by the woman alone, in the absence of the man. It was held by the twelve judges, that the man was not liable to be convicted with the actual utterer, although proved to be the associate of the woman on the day of uttering, and to have had other bad money for the purpose of uttering. And it was also held that the woman could not be convicted of the second offence, of having other bad money in her possession at the time, on the evidence of her associating with a man not present at the uttering, but having large quantities of bad money about him for the purpose of uttering. *Rex v. Else*, and another. R. & R. C. C. 142. Vide as to punishment for utterers of counterfeit money, knowing the same to be counterfeit. 3 Geo. IV. c. 114.

A man who utters a good sixpence, washed, so as to represent a good half sovereign, and obtains for it the value of the latter coin in goods or money, may be indicted for the common misdemeanor of obtaining money or goods under false pretences.

or pains,") the same species of offence is therefore described in other more general words ; viz. impairing, diminishing, falsifying, scaling, and lightening ; and made liable to the same penalties. By statute 8 and 9 W. III. c. 26, made perpetual by 7 Ann. c. 25, whoever, without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession, any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money ; or shall convey the same out of the king's mint ; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason: which is by much the severest branch of the coinage law. The statute goes on further, and enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint ; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal ; shall be construed high treason. (17)

(17) The law upon this subject is now to be found in the statute 2 W. IV. c. 24, by section 10, of which it is enacted, that "if any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly, and without lawful excuse, (the proof of which excuse shall lie on the party accused), have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould, in or upon which there shall be made or impressed, or which shall make or impress, or which shall be intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the king's current gold or silver coin, or any part or parts of both or either of such sides ; or if any person shall, without lawful authority, (the proof whereof shall lie on the party accused) make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse, (the proof whereof shall lie on the party accused),

have in his custody or possession any edger, edging-tool, collar, instrument, or engine, adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures, apparently resembling those on the edges of any of the king's current gold or silver coin, such person knowing the same to be so adapted and intended as aforesaid ; or if any person shall, without lawful authority, to be proved as aforesaid, make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse, to be proved as aforesaid, have in his custody or possession any press for coinage, or any cutting-engine for cutting by force of a screw or of any other contrivance, round blanks out of gold, silver, or other metal, such person knowing such press to be a press for coinage, or knowing such engine to have been used, or to be intended to be used for or in order to the counterfeiting of any of the king's current gold or silver coin ; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the

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But all prosecutions on this act are to be commenced within *three* *months after the commission of the offence; except those for making or mending any coining tool or instrument, or for marking money round the edges; which are directed to be commenced within *six* months after the offence committed (*f*). And, lastly, by statute 15 and 16 Geo. II. c. 28, if any person colours or alters any shilling or sixpence, either lawful or counterfeit, to make them respectively resemble a guinea or half guinea; or any halfpenny or farthing to make them respectively resemble a shilling or sixpence; this is also high treason: but the offender shall be pardoned, in case (being out of prison) he discovers and convicts two other offenders of the same kind (18).

(*f*) Stat. 7 Ann. c. 25.

court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

The full enumeration in this section of the instruments which are from henceforth to be considered coining-tools, removes the doubts which before existed on that subject; still, a short statement of the decisions upon the old law may be not improperly inserted here. A collar of iron for graining the edges of counterfeit money, held to be an instrument, although it was to be used in a coining press; *Rex v. Moore*, 2 C. & P. 235. A mould of lead, having the stamp of one side of a shilling, held to be a tool or instrument; *Rex v. Lennard*, 2 W. Bl. 807. A press for coinage, held to be a tool or instrument, so as to make it treason in a party having it knowingly in his possession; *Rex v. Bell*, 1 East, P. C. 169. *Semble*, that having such in possession, for the purpose of coining foreign gold coin not current here, would be a sufficient excuse to take the case out of the statute; *Ib.* Having knowingly in possession a puncheon for the purpose of coining, held to be within the statute, though that alone, without the counter-puncheon, would

not make the figure; *Rex v. Ridgeley*, 1 Leach, 189; 1 East, P. C. 171. Though a puncheon for coining had not the letters, held that it was sufficiently described in an indictment as a puncheon which could impress the head side of a shilling; *Ib.* On an indictment for having in possession a die made of iron and steel, proof of a die made of either material, or of both, held sufficient, for it is immaterial to the offence of what the die is made; *Rex v. Oxford*, R. & R. C. C. 382. And see *Rex v. Phillips*, *Ib.* 369.

(18) But now, by 2 W. IV. c. 24, § 12, "if any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble, or pass for any of the king's current *copper* coin; or if any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly, and without lawful excuse (the proof of which excuse shall lie on the party accused), have in his custody or possession any instrument, tool, or engine, adapted and intended for the counterfeiting any of the king's current *copper* coin; or if any person

3. The other new species of high treason is such as is created for the security of the *protestant succession* over and above such treasons against the king and government as were comprised under the statute 25 Edw. III. For this purpose, after the act of settlement was made, for transferring the crown to the illustrious house of Hanover, it was enacted by statute 13 and 14 W. III. c. 3, that the pretended prince of Wales, who was then thirteen years of age, and had assumed the title of James III. should be attainted of high treason; and it was made high treason for any of the king's subjects by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by statute 17 Geo. II. c. 39, it is enacted, that if any of the sons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the same, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, is made high treason in the same manner as it was to correspond with the father. By the statute 1 Ann. st. 2, c. 17, if any person shall endeavour to deprive or hinder any person, being the next in succession to the crown according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any *overt act, such offence shall be high treason. And by statute 6 Ann. c. 7, if any person shall maliciously,

3. To the protestant succession; history of this branch of treason.

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shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the king's current copper coin, at or for a lower rate or value than the same by its denomination imports, or was coined or counterfeited for; every such offender shall be guilty of felony;" punishable with transportation for seven years, or imprisonment not exceeding two years.

By the same section, knowingly uttering counterfeit copper coin, or knowingly having in possession three pieces of such counterfeit coin, with

intent to utter them, is a misdemeanor, punishable with imprisonment not exceeding one year.

Previous to the passing of this act, the knowingly making, mending, &c. any tools for counterfeiting the copper coin, was only punishable as a misdemeanor at common law. And the uttering or putting off counterfeit copper coin, was not an indictable offence at all; *Rex v. Curwan*, 1 East, P. C. 182; 2 Leach, 384, n.; 1 Russ. 79, 82.

The offence of colouring, &c. copper coin, to make it resemble gold or silver coin, is provided for by sect. 4, of the new statute, *ante*, p. 87, n. (15).

advisedly, and directly, by writing, or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament are not able to make laws and statutes, to bind the crown and the descent thereof; such person shall be guilty of high treason. This offence, or indeed maintaining this doctrine in anywise, that the king and parliament cannot limit the crown, was once before made high treason by statute 13 Eliz. c. 1, during the life of that princess. And after her decease it continued a high misdemeanour, punishable with forfeiture of goods and chattels, even in the most flourishing æra of indefeasible hereditary right and *jure divino* succession. But it was again raised into high treason, by the statute of Anne before mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet, entitled "*vox populi vox Dei* (g)."

The original meaning of treason is a breach of allegiance.

Thus much for the crime of treason, or *læsæ majestatis*, in all its branches; which consists, we may observe, originally, in grossly counteracting that allegiance, which is due from the subject by either birth or residence: though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this its primitive idea (19). But

(g) State Tr. IX. 680.

(19) Some of the early decisions seem to warrant the assertion, that our *judges* have occasionally been actuated by the same species of zeal here attributed by the learned commentator to our *legislators*. The doctrine of *constructive* levying of war, for instance, which has been raised upon the 25 Edw. III., seems scarcely reconcileable with a fair and sound construction of that statute. The language of the act, and the circumstances of the times in which it passed, equally negative the idea that a *constructive* levying of war was contemplated, or indeed any thing short of an open and

organized rebellion. The doctrine certainly originated in cases founded upon other and temporary acts, such as those mentioned in the 3 Inst. 9, 10, and *Burton's case* in Pop. 122, which proceeded upon the 13 Eliz. c. 1. Upon those cases Lord Hale says, in 1 H. P. C. 132, "these resolutions being made and settled, we must acquiesce in them; but, in my opinion, if new cases happen, for the future, that have not an express resolution in point, nor are expressly within the words of 25 Edw. III. though they may seem to have a parity of reason, it is the safest way, and most agreeable

of this enough has been hinted already: it is now time to pass on, from defining the crime, to describing its punishment.

The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually, by connivance (*h*), at length ripened by humanity into law, a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement (*i*). 2. That he *be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal (*j*) (20).

The punishment of high treason is peculiarly terrible;

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The king may, and often doth, discharge all the punishment, except beheading, especially where any of noble blood are attainted. For beheading being part of the judgment, that may be executed, though all the rest be omitted by the

but the king may remit parts of it.

(*h*) 33 Ass. pl. 7.

(*i*) 1 Hal. P. C. 382.

(*j*) This punishment for treason, Sir Edward Coke tells us, is warranted

by divers examples in scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. (3 Inst. 211.)

to the great act of 25 Edw. III. first to consult the parliament, and have their declaration, and to be very wary in multiplying constructive and interpretative treasons, for we know not where it will end." Subsequent decisions of the like kind stand on an equally bad foundation. *Bensted's case*, Cro. Car. 583, which proceeded upon the 1 Hen. VI. c. 5, is considered by Foster, J., as of no authority; Fost. 211; *Messenger's case*, 6 How. St. Tr. 879, proceeded upon the previous decisions above mentioned, and was decided against the opinion of Lord Hale, 1 H. P. C. 134. And in *Purchase's case*, Fost. 203, 1 East, P. C. 74, the judgment of Parker, C. J., was founded upon precedents merely, and must stand or fall with them. Lord Ten-terden's language upon this point in

Thistlewood's case, 33 How. St. Tr. 683, is very guarded, and certainly does not lead to the inference that every compassing of a *constructive* levying of war is treason within the modern act of parliament; but, on the contrary, that the levying must be with the intent, and for the purposes specified in the statute, and no other.

(20) Now altered by 54 Geo. III. c. 146. The traitor is to be drawn on a hurdle to the place of execution, and be there hanged by the neck until he be dead, and afterwards his head shall be severed from the body, and the body be divided into four quarters, which are at the disposal of his Majesty, who has authority to change the whole sentence into beheading by warrant under the sign manual.

king's command (*k*). But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party, from one species of death to another (*l*). But of this we shall say more hereafter. (*m*)

The punishment of coining is milder: and a distinction is made between male and female offenders.

In the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders; being only to be drawn, and hanged by the neck till dead (*n*). But in treasons of every kind the punishment of women is the same, and different from that of men. For, as the decency due to the sex forbids the exposing and publicly mangling their bodies, their sentence, which is to the full as terrible to sensation as the other, is to be drawn to the gallows, and there to be burned alive (*o*) (21).

Consequences of judgment of high treason are attainder, forfeiture, and corruption of blood.

The consequences of this judgment, attainder, forfeiture, and corruption of blood, must be referred to the latter end of this book, when we shall treat of them all together, as well in treason as in other offences.

(*k*) 1 Hal. P. C. 351.

(*l*) 3 Inst. 52.

(*m*) See ch. xxxii.

(*n*) 1 Hal. P. C. 351.

(*o*) 2 Hal. P. C. 399.

(21) But now by the statute 30 Geo. III. c. 48, women convicted in all cases of treason, shall receive judg-

ment to be drawn to the place of execution, and there to be hanged by the neck till dead.—CH.*

* But they are liable to the same forfeitures and corruption of blood as they would have been if attainted before the passing of the act, §4. The alteration in the punishment of women convicted of treason was as necessary

as the distinction originally made in their favour; for the former punishment could never have been carried into complete execution, without violating "the decency due to the sex."

CHAPTER VII.

OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

As, according to the method I have adopted, we are next to consider such felonies as are more immediately injurious to the king's prerogative, it will not be amiss here, at our first entrance upon this crime, to inquire briefly into the nature and meaning of *felony*; before we proceed upon any of the particular branches, into which it is divided.

Of felonies injurious to the prerogative.

Felony, in the general acceptation of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands and goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted: for those felonies which are called clergyable, or to which the benefit of clergy extends, were anciently punished with death, in all lay, or unlearned, offenders; though now by the statute law that punishment is for the first offence universally remitted. Treason itself, says Sir Edward Coke (*a*), was anciently comprised under the name of felony: and in confirmation of this we may observe, that the statute of treasons, 25 Edw. III. c. 2, speaking of some dubious crimes, directs a reference to parliament; *that it may be there adjudged, “whether they be treason,” or “*other felony*.” All treasons, therefore, strictly speaking, are felonies; though all felonies are not treason. And to this also we may add, that not only all offences, now capital, are in some degree or other felony; but that this is likewise the case with some other offences, which are not punished with death; as suicide, where the party is already dead; homicide by chance-medley, or in self-defence; and petit larceny, or pilfering; all which are, strictly speaking, felonies, as they subject the committers of them to forfeitures. So that upon the

Felony includes some offences which are clergyable, and others which are not.

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(a) 3 Inst. 15.

whole the only adequate definition of felony seems to be that which is before laid down; *viz.* an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

The term is of
feodal origin.

To explain this matter a little further: the word *felony*, or *felonia*, is of undoubted feodal original, being frequently to be met with in the books of feuds, &c. but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest; some deriving it from the Greek, *φηλος*, an impostor or deceiver; others from the Latin, *fallo*, *fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology (*b*); that it is *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as occasions a forfeiture of all the offender's lands, or goods. And this gives great probability to Sir Henry Spelman's Teutonic or German derivation of it (*c*): in which language indeed, as the word is clearly of feodal original, we ought rather to look for its signification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words; *fē*, which signifies, we well know, the fief, feud, or beneficiary estate: and *lon*, which signifies price or value. [**96*] Felony is therefore the same as *pretium feudi*, the *consideration for which a man gives up his fief; as we say in common speech, such an act is as much as your life, or estate, is worth. In this sense it will clearly signify the feodal forfeiture, or act by which an estate is forfeited, or escheats to the lord (*1*).

It is used by the
feodal writers,
as meaning a
forfeiture to the
lord;

To confirm this we may observe, that it is in this sense, of forfeiture to the lord, that the feodal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates (*d*), are styled *felonia* in the feodal law: "*scilicet, per*

(*b*) 1 Inst. 391.

(*c*) Glossar. tit. Felon.

(*d*) See vol. II. p. 284.

(1) But a forfeiture of land is not a necessary consequence of felony; for petit larceny is felony, which does not produce a forfeiture of lands: but

every species of felony is followed by a forfeiture of goods and personal chattels.—CH.

quas feudum amittitur (e)." As, "*si domino deservire noluerit (f); si per annum et diem cessaverit in petenda investitura (g); si dominum ejuravit, i. e. negavit se a domino feudum habere (h); si a domino, in jus eum vocante, ter citatus non comparuerit (i) (2);*" all these, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies by the feudal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures: as assaulting or beating the lord (*k*); vitiating his wife or daughter, "*si dominum cucurbitaverit, i. e. cum uxore ejus concubuerit (l);*" all these are esteemed felonies, and the latter is expressly so denominated, "*si fecerit feloniam, dominum forte cucurbitando (m).*" And as these contempts, or smaller offences, were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand, the lord might be guilty of felony, or forfeit his seignioriness to the vassal, by the same acts as the vassal would have forfeited his feud to the lord. "*Si dominus commisit feloniam, per quam vasallus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiam dominus perdere debet (n) (3).*" One instance given of this sort of felony in the lord is beating the servant of his vassal, so as that he loses his service: which seems merely in the nature of a civil *injury, so far as it respects the vassal. And all these felonies were to be determined "*per laudamentum sive judicium parium suorum*" in the lord's court; as with us forfeitures of copyhold lands are presentable by the homage in the court-baron.

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(e) Feud. l. 2, t. 16, in calc.

(f) Ibid. l. 1, t. 21.

(g) Ibid. l. 2, t. 24.

(h) Ibid. l. 2, t. 34, l. 2, t. 26, § 3.

(i) Feud. l. 2, t. 22.

(k) Feud. l. 2, t. 24, § 2.

(l) Ibid. l. 1, t. 5.

(m) Ibid. l. 2, t. 38; Britton, l. 1, c. 22.

(n) Ibid. l. 2, t. 26 & 47.

(2) Felonies, that is, offences by which the fee is forfeited. As, refusing to do service to the lord; neglecting for a year and a day to apply to be put in possession; abjuring the lord, that is, denying that he holds his fee of him; or not appearing before the lord when

thrice cited to his tribunal.

(3) If the lord commit a felony, by the commission of which, against the lord, the vassal would lose his fee, the lord shall also lose the seignioriness of his fee.

now means the actual crime committed, and not the penal consequence of it as formerly ;

Felony, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands, and, by a small deflection from the original sense, such as induced the forfeiture of goods also, were denominated felonies. Thus it was said, that suicide, robbery, and rape, were felonies ; that is, the consequence of such crimes was forfeiture ; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause, why treason in ancient times was held to be a species of felony ; *viz.* because it induced a forfeiture.

does not necessarily imply capital punishment :

Hence it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide, and petit larceny : and it is possible that capital punishments may be inflicted, and yet the offence be no felony ; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods (*o*), an inseparable incident to felony. And of the same nature was the punishment of standing mute, without pleading to an indictment ; which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short the true criterion of felony is forfeiture ; for, as Sir Edward Coke justly observes (*p*), in all felonies which are punishable with death, the offender loses all his lands in fee-simple, and also his goods and chattels ; in such as are not so punishable, his goods and chattels only.

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and is a generic term, including all capital crimes below treason.

*The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them : and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law (*q*) implies that it shall be punished with death, *viz.* by hanging, as well as with forfeiture : unless the offender prays the benefit of clergy ; which all felons are entitled once to have, provided the same is not expressly taken away by statute. And, in compliance herewith, I shall for the future consider it also in the same light as a generical

(*o*) 3 Inst. 43.

(*p*) 1 Inst. 391.

(*q*) 1 Hawk. P. C. 107 ; 2 Hawk. P. C. 444.

term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offences that are not felonies: which seem at first view repugnant to the general idea which we now entertain of felony, as a crime to be punished by death; whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.

I proceed now to consider such felonies, as are more immediately injurious to the king's prerogative. These are, The five felonies injurious to the prerogative are,

1. Offences relating to the coin, not amounting to treason; 2. Offences against the king's council; 3. The offence of serving a foreign prince; 4. The offence of embezzling or destroying the king's armour, or stores of war. To which may be added a fifth; 5. Desertion from the king's armies in time of war.

I. Offences relating to the *coin*, under which may be ranked some inferior misdemeanors not amounting to felony, are thus declared by a series of statutes, which I shall recite in the order of time (4). And, first, by statute 27 Edw. I. 1. Offences relating to coin, some of which are felonies and others misdemeanors.

(4) We have already seen that all offences relating to coin of the realm are now provided for by the recent statute of 2 W. IV. c. 24; and that offences relating to foreign coin still continue to be provided for by the older statutes of 37 Geo. III. c. 126, and 43 Geo. III. c. 139. The law, as bearing upon both branches (with the exception of the offence of uttering counterfeit coin), will be found in the notes (15) and (16) in Chapter VI; that relating to uttering counterfeit coin seems most properly to claim notice here:—

By sect. 7 of the statute 2 W. IV. c. 24, if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall be guilty of a

misdemeanor, and, being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any more or other false or counterfeit coin resembling, or apparently in-

c. 3, none shall bring pollards and crockards, which were foreign coins of base metal, into the realm, on pain of for-

tended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false and counterfeit, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be imprisoned for any term not exceeding two years: and if any person who shall have been convicted of any of the misdemeanors hereinbefore mentioned, shall afterwards commit any of the said misdemeanors, such person shall be deemed guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years.

In an indictment for putting off counterfeit money, the names of the persons to whom it was put off ought to be set out; *Anon.* 1 East, P. C. 180. Proof that the defendant had uttered other base money, or had other base money about him at the time of uttering, will be evidence for the jury to presume a guilty knowledge; *Rex v. Whiley*, 2 Leach, 983. Where a man and woman were indicted for uttering a bad shilling to M. B., and having in their possession another bad shilling at the time, and the uttering was by the woman alone in the absence of the man; it was held, first, that the man was not liable to be convicted with the actual utterer, although proved to be the associate of the woman on the day of uttering, and to have had other bad money about him for the purpose of uttering: and, secondly, that the woman could not be convicted of the second offence of having other bad money in her possession, on the evidence of her associating with a man not present at the uttering, but having large quantities of bad money about him for the purpose of uttering; *Rex v. Else*, R. & R. C. C. 142. But if two are indicted for uttering a counterfeit shilling, hav-

ing another counterfeit shilling in their possession, it is not necessary to prove with certainty which of the pieces was the one uttered, and which was found on them unuttered, if both the pieces are proved to be counterfeits. And if it appears that two went to a shop, and that one of them went in and uttered the bad money, having no more in his possession, and the other staid outside the shop, having other bad pieces of money, both may be convicted; the uttering and the possession being both joint; *Rex v. Skerritt*, 2 C. & P. 427.

Where several are charged with uttering, it must appear either that they were all present, or so near the party actually uttering as to be able to render him aid and assistance; *Rex v. Soares*, R. & R. C. C. 25; *Rex v. Davis*, Id. 113. The second uttering must be stated in the same count as the first; for the two facts of uttering twice in the same day form one charge, and should be stated in one count; *Rex v. Tandy*, 2 Leach, 835; *Curwan's case*, 1 East, P. C. 182. But where two utterings are charged in one count on the same day, the day is material, and the fact of twice uttering is sufficiently averred; and it will be taken that the utterings were at different times in the same day; *Rex v. Martin*, 2 Leach, 923; 1 Russ. 83. In an indictment for uttering after a previous conviction for the same offence, the previous conviction must be set forth with a *prout patet per recordum*; *Rex v. Turner*, R. & M. C. C. 47. The merely having counterfeit silver in possession, with intent to utter it as good, has been held to be no offence, because there is no criminal act done; *Rex v. Heath*, R. & R. C. C. 184; *Rex v. Stewart*, Id. 288. But procuring it with intent to utter it as good, has been held to be a misdemeanor, and having a large quantity of it, is evidence that it was procured with such intent; *Rex v. Fuller*, Id. 308.

feiture of life and goods. By statute 9 Edw. III. st. 2, no sterling money shall be melted down, upon pain of forfeiture thereof. *By statute 17 Edw. III., none shall be so hardy to bring false and ill money into the realm, on pain of forfeiture of life and member by the persons importing, and the searchers permitting such importation. By statute 3 Hen. V. st. 1, to make, coin, buy, or bring into the realm any galley-halfpence, fuskings, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or *blanks* (r) is forfeiture of an hundred shillings. By statute 14 Eliz. c. 3, such as forge any foreign coin, although it be not made current here by proclamation, shall, with their aiders and abettors, be guilty of misprision of treason, a crime which we shall hereafter consider. By statute 13 and 14 Car. II. c. 31, the offence of melting down any current silver money shall be punished with forfeiture of the same, and also the double value: and the offender, if a freeman of any town, shall be disfranchised; if not, shall suffer six months' imprisonment. By statute 6 and 7 W. III. c. 17, if any person buys or sells, or knowingly has in his custody, any clippings or filings of the coin, he shall forfeit the same and 500*l.*; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By statute 8 and 9 W. III. c. 26, if any person shall blanch, or whiten, copper for sale, which makes it resemble silver; or buy or sell, or offer to sale, any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but be beneath the standard; or if any person shall receive or pay at a less rate than it imports to be of, which demonstrates a consciousness of its baseness, and a fraudulent design, any counterfeit or diminished milled money of this kingdom, not being cut in pieces, an operation which is expressly directed to be performed when any such money shall be produced in evidence, and which any person, to whom any gold or silver money is tendered, is empowered by statutes 9 and 10 W. III. c. 21, 13 Geo. III. c. 71, and 14 Geo. III. c. 70, to perform at his own hazard, and the officers of the exchequer and receivers general of the taxes are particularly required to perform: all such persons shall be guilty of felony; and may be prosecuted for the same at

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(r) Stat. 2 Hen. VI. c. 9.

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any time within three months after the offence committed. *But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanor at common law, it is enacted by statute 15 and 16 Geo. II. c. 28, that if any person shall utter or tender in payment any counterfeit coin, knowing it so to be, he shall for the first offence be imprisoned six months, and find sureties for his good behaviour for six months more; for the second offence, shall be imprisoned two years, and find sureties for two years longer: and, for the third offence, shall be guilty of felony without benefit of clergy. Also if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody; or shall, within ten days after, knowingly tender other false money; he shall be deemed a common utterer of counterfeit money, and shall for the first offence be imprisoned one year, and find sureties for his good behaviour for two years longer; and for the second, be guilty of felony without benefit of clergy. By the same statute it is also enacted, that if any person counterfeits the copper coin, he shall suffer two years' imprisonment, and find sureties for two years more. By statute 11 Geo. III. c. 40, persons counterfeiting copper halfpence or farthings, with their abettors; or buying, selling, receiving, or putting off any counterfeit copper money, not being cut in pieces or melted down, at a less value than it imports to be of; shall be guilty of single felony. And by a temporary statute, 14 Geo. III. c. 42, if any quantity of money exceeding the sum of five pounds, being or purporting to be the silver coin of this realm, but below the standard of the mint in weight or fineness, shall be imported into Great Britain or Ireland, the same shall be forfeited in equal moieties to the crown and prosecutor. Thus much for offences relating to the coin, as well misdemeanors as felonies, which I thought it most convenient to consider in one and the same view.

2. Felonies
against the
king's council.

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2. Felonies, against the king's *council* (s), are these. First, by statute 3 Hen. VII. c. 14, if any sworn servant of the king's household conspires or confederates to kill any lord of this *realm, or other person, sworn of the king's council, he shall be guilty of felony. Secondly, by statute 9 Ann. c. 16, to assault, strike, wound, or attempt to kill, any privy

(s) See vol. I. p. 334.

counsellor in the execution of his office, is made felony without benefit of clergy (5).

3. Felonies in *serving foreign states*, which service is generally inconsistent with allegiance to one's natural prince, are restrained and punished by statute 3 Jac. I. c. 4, which makes it felony for any person whatever to go out of the realm to serve any foreign prince, without having first taken the oath of allegiance before his departure (6). And it is felony also for any gentleman, or person of higher degree, or who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond with two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against his natural sovereign. And further, by statute 9 Geo. II. c. 30, enforced by statute 29 Geo. II. c. 17, if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without licence under the king's sign manual, he shall be guilty of felony without benefit of clergy: but if the person, so enlisted or enticed, shall discover his seducer within fifteen days, so as he may be apprehended and convicted of the same, he shall be indemnified. By statute 29 Geo. II. c. 17, it is moreover enacted, that to serve under the French king, as a military officer, shall be felony without benefit of clergy; and to enter into the Scotch brigade, in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500*l.* (7).

3. Felonies in serving foreign states.

(5) Both these statutes are repealed by 9 Geo. IV. c. 31, by § 11 of which all attempts to kill are made capital offences, without any distinction as to the rank and station of the party attacked, except, of course, as to the king and the branches of the royal family mentioned in the 25 Edw. III.

(6) Upon the construction of this statute it has been considered, that if a party go out of the realm with intent to serve a foreign state, although there be no service in fact; or if a party do actually so serve, though he did not go over for that purpose, it will be within

the statute; 1 Russ. 92. The place where the offence is committed is that where the party passes out of the kingdom, *Ibid.*

(7) The following Acts are now repealed by 59 Geo. III. c. 69, § 1; viz. 9 Geo. II. c. 30; 29 Geo. II. c. 17; 11 Geo. II. (Ireland); 19 Geo. II. (Ireland). Section 2 of 59 Geo. III. enacts, That any person who shall enlist, or engage to enlist, or serve, in foreign service, military or naval, or engaging to go, or going into foreign countries with intent to enlist, or serve, either by land or sea, or who shall re-

4. Felony in embezzling the king's armour or stores.

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4. Felony by *embezzling* or *destroying* the king's armour or warlike stores, is, in the first place, so declared to be by statute 31 Eliz. c. 4, which enacts, that if any person having the charge or custody of the king's armour, ordnance, ammunition, or habiliments of war; or of any victual provided for victualling the king's soldiers or mariners; shall, either for gain, or to impede his majesty's service, embezzle the same *to the value of twenty shillings, such offence shall be felony. And the statute 22 Car. II. c. 5, takes away the benefit of clergy from this offence, and from stealing the king's naval stores to the value of twenty shillings (8); with a power for the judge, after sentence, to transport the offender for seven years. Other inferior embezzlements and misdemeanors, that fall under this denomination, are punished, by statutes 9 and 10 W. III. c. 41; 1 Geo. I. c. 25; 9 Geo. I. c. 8, and 17 Geo. II. c. 40, with fine, corporal punishment, and imprisonment (9). And by statute 12 Geo. III. c. 24, to set on fire, burn, or destroy any of his majesty's ships of war, whether built, building, or repairing; or any of the king's arsenals, magazines, dock-yards, ropeyards, or victualling offices, or materials thereunto belonging; or military, naval, or vic-

tain, or procure, or endeavour to hire or engage any others to enlist or be employed in any such foreign service, shall be guilty of a misdemeanor, and upon a conviction, upon any information or indictment, shall be punishable by fine and imprisonment, or either of them, at the discretion of the court, before which the offender may be convicted.

By sect. 5, vessels with persons on board engaged in foreign service, may be detained at any port in his majesty's dominions, upon information being given on oath as therein prescribed.

By sect. 6, masters of ships and vessels taking on board any person or persons known to be enlisted, as before recited, shall forfeit the sum of 50*l.* for each and every person so taken, or engaged to be taken on board.

Sections 7 & 8 provide certain penalties on persons fitting out armed vessels to aid in military operations

with any foreign powers without licence, or aiding the warlike equipment of vessels of foreign states. See the general law upon this subject stated and reviewed in the late case of *Doe v. Acklam*, 4 D. & R. 394; 2 B. & C. 779.

(8) By 4 Geo. IV. c. 53, the capital punishment imposed by this act is repealed; and, it is enacted that offenders shall be transported for life, or for any term not less than seven years, or suffer imprisonment with or without hard labour for any term not exceeding seven years. The whole of this act, except as relates to this particular subject, is repealed by 7 & 8 Geo. IV. c. 27.

(9) To which have since been added 1 & 2 Geo. III. c. 56; 39 & 40 Geo. III. c. 89; 53 Geo. III. c. 126; 54 Geo. III. c. 60, c. 159; 55 Geo. III. c. 127; 56 Geo. III. c. 80; 1 & 2 Geo. IV. c. 75; 4 Geo. IV. c. 53.

tualling stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in, such offence; shall be felony without benefit of clergy (10).

5. Desertion from the king's armies in time of war, whether by land or sea, in England or in parts beyond the seas, is by the standing laws of the land, exclusive of the annual acts of parliament to punish mutiny and desertion, and particularly by statute 18 Hen. VI. c. 19, and 5 Eliz. c. 5, made felony, but not without benefit of clergy. But by the statute 2 and 3 Edw. VI. c. 2, clergy is taken away from such deserters, and the offence is made triable by the justices of every shire. The same statutes punish other inferior military offences with fines, imprisonment, and other penalties (11).

5. Desertion from the king's armies by land, or by sea.

(10) As to the stealing from and plundering ships generally, see 7 & 8 Geo. IV. c. 29, § 17 & 18: as to destroying or injuring ships generally, see 1 & 2 Geo. IV. c. 75, § 11; 7 & 8 Geo. IV. c. 30, § 9, 10 & 11.

(11) To this class of felonies injurious to the king's prerogative may be added two felonies lately created by the legislature, who thought it expedient to repress the attempts of mischievous and disaffected persons by transportation or capital punishment. The 37 Geo. III. c. 70 (made perpetual by 57 Geo. III. c. 7), enacts, that if any person shall maliciously and advisedly endeavour to seduce any person serving in his majesty's service by sea or land from his duty and allegiance, or to incite any person to commit any act of mutiny or mutinous practice, he shall be guilty of felony, and shall suffer death without benefit of clergy.

The crime wherever committed may be tried in any county.*

And by the 37 Geo. III. c. 123, it is enacted, that whoever shall administer, or cause to be administered, or shall be present at and consenting to the administering of, or shall take, any oath or engagement intending to bind any person in any mutinous or seditious purpose, or to belong to any seditious society or confederacy, or to obey any committee, or any person, not having legal authority for that purpose, or not to give evidence against any confederate or other person, or not to discover any unlawful combination, or any illegal act, or any illegal oath or engagement, shall be guilty of felony, and may be transported for seven years. Compulsion shall be no excuse, unless the party within four days after he has an opportunity disclose the whole of the case to a justice of the peace, or if a seaman or soldier, to his commanding officer. An offence against this act committed any where may be tried in any county, unless it be committed in

* A sailor in a sick hospital, where he had been for thirty days, and therefore not entitled to pay, nor liable for what he then did to a court martial, has been held to be a person serving in his majesty's forces by sea, and the seducing him an offence within this act;

Rex v. Tierney, R. & R. C. C. 74.

In an indictment under this act, it is sufficient to charge an endeavour to incite, &c. without specifying the means employed; *Rex v. Fuller*, 1 B. & P. 180.

Scotland; it shall then be tried in the criminal courts of that country.

A person acquitted under either of these statutes shall not be prosecuted again for the same fact for high trea-

son, but these statutes shall not prevent any person not already tried under them from being prosecuted for high treason, in the same manner as if they had not been passed.—CH.*

* The unlawful administering, by any associated body of men, of an oath to any person, purporting to bind him not to reveal or discover such unlawful combination or conspiracy, nor any illegal act done by them, has been held to be felony within this statute, though the object of such association were a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition; *Rex v. Marks*, 3 East, 157. The ground of which decision seems to be, that though the preamble and the early part of the enacting clause, relate exclusively to cases of mutiny and sedition, yet, taken altogether, the enacting clause is more general than the preamble, and is large enough to embrace other cases than those of mutiny and sedition.

By sect. 4 of this statute, it shall not be necessary in an indictment for any offence under it, to set forth the words of the oath, but it shall be sufficient to set forth the purport of it, or some material part thereof. Upon which it has been held, that an indictment, charging that the defendants administered to J. H. an oath, intending to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace, for any act or expression of his or theirs, &c. is good, without alleging the tenor or purport of the oath to be set forth, and without shewing in what manner the public peace was meant to be disturbed by such society; *Rex v. Moors*, 6 East, 419.

So, where a witness, swearing to the words spoken by way of oath by the prisoner when he administered the same, said, that he held a paper in his hand at the same time when he administered the oath, from which it was supposed he read the words; it was held, that parol evidence of what he in

fact said was sufficient, without giving him notice to produce such paper. *Id.*

So where the oath, on the face of it, did not purport to be for a seditious purpose, it was held, that evidence might be given to shew that the brotherhood therein referred to was a seditious society. *Id.*

52 Geo. III. c. 104, provides, that every person who shall administer, or cause to be administered, or be aiding and assisting in the administration of, any oath or engagement intended to bind the party sworn to the commission of any treason, murder, or capital felony, shall be guilty of felony without benefit of clergy. And every one taking the same, not being compelled, shall be guilty of felony, and be transported for life, or for such time as the court before which the conviction takes place, may decide.

Persons compelled to take such oath are not exonerated, unless they discover the same within fourteen days.

57 Geo. III. c. 19, § 25, extends the provisions of the former acts to all future societies, and the members thereof, taking unlawful oaths, &c. or electing committees, delegates, &c. And 60 Geo. III. c. 1, prohibits meetings and assemblies of persons for the purpose of being trained, or of practising military exercise, under pain of transportation for seven years, or imprisonment for two years; and renders persons attending such meetings or assemblies, liable to fine, and imprisonment not exceeding two years. Upon the subject of the evidence admissible to prove the intent of persons indicted for assembling, &c. under this act, see *Rex v. Hunt*, 3 B. & A. 566; *Redford v. Birley*, 3 Stark. Ev. 1510; 3 Stark. N. P. C. 76; *Rex v. Broadribb*, 6 C. & P. 571; *Rex v. Ball*, *Id.* 563.

CHAPTER VIII. OF PRÆMUNIRE.

A THIRD species of offence more immediately affecting the king and his government, though not subject to capital punishment, is that of *præmunire*: so called from the words of the writ preparatory to the prosecution thereof; "*præmunire (a) facias A. B.*" cause A. B. to be forewarned that he appear before us to answer the contempt wherewith he stands charged; which contempt is particularly recited in the preamble to the writ (*b*). It took its original from the exorbitant power claimed and exercised in England by the pope, which even in the days of blind zeal was too heavy for our ancestors to bear.

Præmunire is an offence against the king and his government, originating from the pope.

It may justly be observed, that religious principles, which, when genuine and pure, have an evident tendency to make their professors better citizens as well as better men, have, when perverted and erroneous, been usually subversive of civil government, and been made both the cloak and the instrument of every pernicious design that can be harboured in the heart of man. The unbounded authority that was exercised by the Druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet, both witness to the truth of that ancient universal observation, that, in all ages, and in all countries, civil and ecclesiastical tyranny are mutually productive of each other. It is therefore the glory of the church of England, that she inculcates due obedience to lawful authority, and hath been, as her prelates on *a trying occasion once expressed it (*c*), in her principles and practice ever most unquestionably loyal. The clergy of her persuasion, holy in their doctrines and un-

Civil and ecclesiastical tyranny are mutually productive of each other; as appears from the conduct of the popish clergy in this country.

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(a) A barbarous word for *præmoneri* (1)

(b) Old Nat. Brev. 101, edit. 1534.

(c) Address to James II. 1687.

(1) *Præmunio*, in law Latin, is used in all its tenses and participles, for *præmoneo* or *cito*. DUCANGE *Gloss.*—CH.

blemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their law-giver, and pride themselves in nothing more justly, than in being true members of the church, emphatically *by law* established. Whereas the notions of ecclesiastical liberty, in those who differ from them, as well in one extreme as the other, for I here only speak of extremes, are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights, which reason and the original contract of every free state in the universe have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England, who murdered their sovereign, overturned the church and monarchy, shook every pillar of law, justice, and private property, and most devoutly established a kingdom of the saints in their stead. But these horrid devastations, the effects of mere madness, or of zeal that was nearly allied to it, though violent and tumultuous, were but of a short duration. Whereas the progress of the papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root, and was at length in some places with difficulty, in others never yet, extirpated. For this we might call to witness the black intrigues of the jesuits, so lately triumphant over Christendom, but now universally abandoned by even the roman catholic powers: but the subject of our present

[*105] *chapter rather leads us to consider the vast strides which were formerly made in this kingdom by the popish clergy; how nearly they arrived to effecting their grand design; some few of the means they made use of for establishing their plan; and how almost all of them have been defeated or converted to better purposes, by the vigour of our free constitution, and the wisdom of successive parliaments.

The ancient British church, by whomsoever planted, was a stranger to the bishop of Rome, and all his pretended authority. But the pagan Saxon invaders having driven the professors of christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk, and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in these kingdoms, till the æra of the Norman conquest: when the then reigning pontiff having favoured duke William in his projected invasion, by blessing his host and consecrating his banners, he took that opportunity also of establishing his spiritual encroachments; and was even permitted so to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates; prelates, who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in rivetting the chains of a freeborn people.

Civil authority in England was first claimed by the pope at the æra of the Norman conquest;

The most stable foundation of legal and rational government is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan: with this difference however, that the measure of obedience in the one is grounded on the principles of society, and is extended no further than reason and necessity will warrant: in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effectually therefore to enslave the consciences and minds of the people, the Romish *clergy themselves paid the most implicit obedience to their own superiors or prelates; and they, in their turns, were as blindly devoted to the will of the sovereign pontiff, whose decisions they held to be infallible, and his authority coextensive with the christian world. Hence his legates *a latere* were introduced into every kingdom of Europe, his bulls and decretal epistles became the rule both of faith and discipline, his judgment was the final resort in all cases of doubt or difficulty, his decrees were enforced by anathemas and spiritual censures, he dethroned even kings that were refractory, and denied to whole kingdoms, when undutiful, the exercise of christian ordinances, and the benefits of the gospel of God.

and was soon rendered coextensive with the christian world.

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By various means he appropriated to himself the wealth of Christendom ;

But, though the being spiritual head of the church was a thing of great sound, and of greater authority, among men of conscience and piety, yet the court of Rome was fully apprized that, among the bulk of mankind, power cannot be maintained without property ; and therefore its attention began very early to be rivetted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. Newfangled offences were created, and indulgences were sold to the wealthy, for liberty to sin without danger. The canon law took cognizance of crimes, enjoined penance *pro salute animæ*, and commuted that penance for money. Non-residence and pluralities among the clergy, and marriages among the laity related within the seventh degree, were strictly prohibited by canon ; but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom was gradually drained by a thousand channels, into the coffers of the holy see.

assumed the feudal authority, and originated the term benefice ;

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The establishment also of the feudal system in most of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the church ; which began first in Italy, and gradually spread itself to England. The pope became a *feodal lord ; and all ordinary patrons were to hold their right of patronage, under this universal superior. Estates held by feudal tenure, being originally gratuitous donations, were at that time denominated *beneficia* : their very name as well as constitution was borrowed, and the care of the souls of a parish thence came to be denominated a *benefice*. Lay fees were conferred by investiture or delivery of corporal possession ; and spiritual benefices, which at first were universally donative, now received in like manner a spiritual investiture, by institution from the bishop, and induction under his authority. As lands escheated to the lord, in defect of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feudal render, or rent reserved upon a grant ; the oath of canonical obedience was copied from the oath of fealty required from the vassal by his superior ;

and the *primer seisins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy. And the occasional aids and talliages, levied by the prince on his vassals, gave a handle to the pope to levy, by the means of his legates *a latere*, peterpence and other taxations.

At length the holy father went a step beyond any example of either emperor or feudal lord. He reserved to himself, by his own apostolical authority (*d*), the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither, or back again; and moreover such also as became vacant by his promotion to a bishopric or abbey: “*etiamsi ad illa personæ consueverint et debuerint per electionem aut quemvis alium modum assumi* (2).” And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feudal estate by the lord. Dispensations to avoid these vacancies begat the doctrine of *commendams*; and papal *provisions* were the previous nomination to such benefices, by a kind of anticipation, before they *became actually void; though afterwards indiscriminately applied to any right of patronage exerted or usurped by the pope. In consequence of which the best livings were filled by Italian and other foreign clergy, equally unskilled in and adverse to the laws and constitution of England. The very nomination to bishoprics, that ancient prerogative of the crown, was wrested from king Henry the first, and afterwards from his successor king John; and seemingly indeed conferred on the chapters belonging to each see: but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the pope. And, to sum up this head with a transaction most unparalleled and astonishing in its kind, pope Innocent III. had at length the effrontery to demand, and king John had the meanness to consent to, a resignation of his crown to the pope, whereby

the entire patronage of the church was assumed by him, and the crown was resigned into his hands:

[*108]

(*d*) Extrav. l. 3, t. 2, c. 13.

(2) Even though the parties were accustomed, and ought to be advanced to them, by election, or any other mode.

England was to become for ever St. Peter's patrimony; and the dastardly monarch reaccepted his sceptre from the hands of the papal legate, to hold as the vassal of the holy see, at the annual rent of a thousand marks.

he endowed religious houses,

Another engine set on foot, or at least greatly improved, by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes, which the law of the land had given to the parochial clergy, they endeavoured to grasp at the lands and inheritances of the kingdom, and, had not the legislature withstood them, would by this time have probably been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of sour and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior the pope. And as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monastery a little before their deaths would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeyes and religious houses were built within a *century after the conquest, and endowed, not only with the tithes of parishes which were ravished from the secular clergy, but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

[*109]

and adopted other stratagems for the usurpation of all civil power.

I might here have enlarged upon other contrivances which will occur to the recollection of the reader, set on foot by the court of Rome, for effecting an entire exemption of its clergy from any intercourse with the civil magistrate: such as the separation of the ecclesiastical court from the temporal; the appointment of its judges by merely spiritual authority, without any interposition from the crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal. But the history and pro-

gress of ecclesiastical courts (*e*), as well as of purchases in mortmain (*f*), have already been fully discussed in the preceding volumes; and we shall have an opportunity of examining at large the nature of the *privilegium clericale* in the progress of the present book. And therefore I shall only observe at present, that notwithstanding this plan of pontifical power was so deeply laid, and so indefatigably pursued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavours of a body of men, who engrossed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, being fired with a bigoted enthusiasm, which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments, unconnected with their fellow-subjects, and totally indifferent what might befall that posterity to which they bore no endearing relation: yet it vanished into *nothing, when the eyes of the people were a little enlightened, and they set themselves with vigour to oppose it. So vain and ridiculous is the attempt to live in society, without acknowledging the obligations which it lays us under; and to affect an entire independence of that civil state, which protects us in all our rights, and gives us every other liberty, that only excepted of despising the laws of the community.

Having thus in some degree endeavoured to trace out the original and subsequent progress of the papal usurpations in England, let us now return to the statutes of *præmunire*, which were framed to encounter this overgrown yet increasing evil. King Edward I., a wise and magnanimous prince, set himself in earnest to shake off this servile yoke (*g*). He would not suffer his bishops to attend a general council, till they had sworn not to receive the papal benediction. He made light of all papal bulls and processes: attacking Scotland, in defiance of one; and seizing the temporalities of his clergy, who, under pretence of another, refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulph, in which all the lands of the kingdom were in danger of being swallowed.

The struggles of Edward I. to shake off the papal yoke were the foundation of the statutes of *præmunire*.

[*110]

(*e*) See vol. III. page 61.

(*f*) See vol. II. page 268.

(*g*) Dav. 83, &c.

And, one of his subjects having obtained a bull of excommunication against another, he ordered him to be executed as a traitor, according to the ancient law (*h*). And in the thirty-fifth year of his reign was made the first statute against papal provisions, being, according to Sir Edward Coke (*i*), the foundation of all the subsequent statutes of *præmunire*, which we rank as an offence immediately against the king, because every encouragement of the papal power is a diminution of the authority of the crown.

Further acts of resistance to the papal power were made in the reigns of Edward II. and III:

[*111]

In the weak reign of Edward the second the pope again endeavoured to encroach, but the parliament manfully withstood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance to the bulls of the see of Rome. But Edward the third was of a temper extremely different; and, to remedy these *inconveniences first by gentle means, he and his nobility wrote an expostulation to the pope: but receiving a menacing and contemptuous answer, withal acquainting him, that the emperor, who a few years before at the diet of Nuremberg, A. D. 1323, had established a law against provisions (*k*), and also the king of France had lately submitted to the holy see; the king replied, that if both the emperor and the French king should take the pope's part, he was ready to give battle to them both, in defence of the liberties of the crown. Hereupon more sharp and penal laws were devised against provisors (*l*), which enact severally, that the court of Rome shall not present or collate to any bishopric or living in England; and that whoever disturbs any patron in the presentation to a living by virtue of a papal provision, such provisor shall pay fine and ransom to the king at his will, and be imprisoned till he renounces such provision: and the same punishment is inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome. And when the holy see resented these proceedings, and pope Urban V. attempted to revive the vassalage and annual rent to which king John had subjected his kingdom, it was unanimously agreed by all the estates of the realm in parliament assembled, 40 Edw. III. that king John's donation was null and

(*h*) Bro. Abr. tit. Coron. 115.
Treason, 14. 5 Rep. part 1, fol. 12.
3 Ass. 19.

(*i*) 2 Inst. 583.

(*k*) Mod. Un. Hist. xxix. 293.

(*l*) Stat. 25 Edw. III. st. 6; 27
Edw. III. stat. 1, c. 1; 38 Edw. III.
stat. 1, c. 4, and stat. 2, c. 1, 2, 3 4.

void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope should endeavour by process or otherwise to maintain these usurpations, they would resist and withstand him with all their power (*m*).

In the reign of Richard the second, it was found necessary to sharpen and strengthen these laws, and therefore it was enacted by statutes 3 Rich. II. c. 3, and 7 Rich. II. c. 12, first, that no alien should be capable of letting his benefice to farm; in order to compel such, as had crept in, at least to reside on their preferments: and, afterwards, that no alien *should be capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors (3). By the statute 12 Rich. II. c. 15, all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the statute 13 Rich. II. st. 2, c. 2, adds banishment and forfeiture of lands and goods: and by c. 3, of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

In the writ for the execution of all these statutes the words *præmunire facias*, being, as we said, used to command a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *præmunire*. And accordingly the next statute I shall mention, which is generally referred to by all subsequent statutes, is usually called the statute of *præmunire*. It is the statute 16 Rich. II. c. 5, which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or

and in the reign
of Richard II.

[*112]

In 16 Richard II.
the statute of
præmunire
passed,

(*m*) Seld. in Flet. c. 4.

(3) It has recently been decided by the court of King's Bench, that a person born in the United States of America, since the treaty of 1783, by which those states were acknowledged by this

country to be free, sovereign, and independent, is an alien, and cannot take lands by descent in England. *Doe v. Acklam*, 4 D. & R. 394; 2 B. & C. 779.

other things which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council; or process of *præmunire facias* shall be made out against them, as in other cases of provisors.

and was afterwards enlarged under Henry IV.

By the statute 2 Hen. IV. c. 3, all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *præmunire*. And this is the last of our ancient statutes touching this offence; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards; the spirit of the nation being so much raised *against foreigners, that about this time, in the reign of Henry the fifth, the alien priories, or abbeys for foreign monks, were suppressed, and their lands given to the crown. And no further attempts were afterwards made in support of these foreign jurisdictions.

[*113]

Its operation was regulated under Henry VI.

A learned writer, before referred to, is therefore greatly mistaken, when he says (*n*), that in Henry the sixth's time the archbishop of Canterbury and other bishops offered to the king a large supply, if he would consent that all laws against provisors, and especially the statute 16 Rich. II. might be repealed; but that this motion was rejected. This account is incorrect in all its branches. For, first, the application, which he probably means, was made not by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439, 18 Hen. VI. that very synod which at the same time refused to confirm and allow a papal bull, which then was laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II. in particular; but to request that the penalties thereof, which by a forced construction were applied to all that sued in the spiritual, and even in many temporal, courts of this realm, might be turned against the proper objects only; those who appealed to Rome, or to any foreign jurisdictions; the tenor of the petition being, "that those penalties should be taken to extend only to those

that commenced any suits or procured any writs or public instruments at Rome, or elsewhere out of England; and that no one should be prosecuted upon that statute for any suit in the spiritual courts or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament, and in the mean time that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion (o).

*And indeed so far was the archbishop, who presided in this synod, from countenancing the usurped power of the pope in this realm, that he was ever a firm opposer of it. And, particularly in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate *a latere* from the pope; upon the mere principles of its being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon that subject, "he was bound to oppose it by his ligeance, and also to quit himself to God, and the church of this land, of which God and the king had made him governor." This was not the language of a prelate addicted to the slavery of the see of Rome; but of one, who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, 17 Hen. VI. he refused to consecrate a bishop of Ely, that was nominated by pope Eugenius IV.: a conduct quite consonant to his former behaviour, in 6 Hen. VI. when he refused to obey the commands of pope Martin V. who had required him to exert his endeavours to repeal the statute of *præmunire*; "*execrabile illud statutum*," as the holy father phrases it, which refusal so far exasperated the court of Rome against him, that at length the pope issued a bull to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible were the nation of their primate's merit, that the lords spiritual, and temporal, and also the university of Oxford, wrote letters to the pope in his defence; and the house of commons addressed the king, to send an ambassador forthwith to his holiness, on behalf of the arch-

[*114]

The pope's resistance to this change proved unsuccessful.

(o) Wilk. Concil. Mag. Brit. III. 533.

[*115]
Various subsequent statutes extended the penalties of præmunire.

bishop, who had incurred the displeasure of the pope for opposing the excessive power of the court of Rome (*p*).

*This then is the original meaning of the offence, which we call *præmunire*; viz. introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal process, which constitutionally belonged to the king alone, long before the reformation in the reign of Henry the eighth: at which time the penalties of *præmunire* were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the several statutes of 24 Hen. VIII. c. 12, and 25 Hen. VIII. c. 19 and 21, to appeal to Rome from any of the king's courts, which, though illegal before, had at times been connived at; to sue to Rome for any licence or dispensation; or to obey any process from thence; are made liable to the pains of *præmunire*. And, in order to restore to the king in effect the nomination of vacant bishoprics, and yet keep up the established forms, it is enacted by statute 25 Hen. VIII. c. 20, that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *præmunire*. Also by statute 5 Eliz. c. 1, to refuse the oath of supremacy will incur the pains of *præmunire*; and to defend the pope's jurisdiction in this realm, is a *præmunire* for the first offence, and high treason for the second. So too, by statute 13 Eliz. c. 2, to import any *agnus Dei*, crosses, beads, or other superstitious things pretended to be hallowed by the bishop of Rome, and tender the same to be used; or to receive the same with such intent, and not discover the offender; or if a justice of the peace, knowing thereof, shall not within fourteen days declare it to a privy counsellor, they all incur a *præmunire*. But importing or selling mass books, or other popish books, is by statute 3 Jac. I. c. 5, § 25, only liable to a penalty of forty shillings. Lastly, to contribute to the

(*p*) See Wilk. Concil. Mag. Br. Vol. III. *passim*. and Dr. Duck's Life of Archbishop Chichele, who was the prelate here spoken of, and the munificent founder of All Soul's college in Oxford: in vindication of whose memory the author hopes to be excused

this digression; if indeed it be a digression, to shew how contrary to the sentiments of so learned and pious a prelate, even in the days of popery, those usurpations were, which the statutes of *præmunire* and provisors were made to restrain.

maintenance of a jesuit's college, or any popish seminary whatever, beyond sea; or any person in the same; or to contribute to the maintenance of any jesuit or popish priest in England, is by statute 27 Eliz. c. 2, made liable to the penalties of *præmunire*.

*Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the pope: but, they being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences: some of which bear more, and some less relation to this original offence, and some no relation at all.

[*116]

Præmunire applies to offences unconnected with the papal usurpation.

Thus, 1. By the statute 1 and 2 Ph. and Mar. c. 8, to molest the possessors of abbey lands granted by parliament to Henry the eighth, and Edward the sixth, is a *præmunire*. 2. So likewise is the offence of acting as a broker or agent in any usurious contract, where above ten *per cent.* interest is taken, by statute 13 Eliz. c. 10 (4). 3. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *præmunire*, by statute 21 Jac. I. c. 3. 4. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *præmunire* by two statutes: the one 16 Car. I. c. 21, the other 1 Jac. II. c. 8 (5). 5. On the abolition, by statute 12 Car. II. c. 24, of purveyance (*q*), and the prerogative of preemption, or taking any victual, beasts, or goods for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *præmunire*. 6. To assert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *præmunire* by statute 13 Car. II. c. I. 7. By the *Habeas Corpus* Act also, 31 Car. II. c. 2, it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties (*r*), to send any subject of this realm a

As, acting as broker in an usurious contract; illegally obtaining a stay of proceedings in a suit for monopoly; obtaining a patent for the sole making, &c. of gunpowder; the exertion of the obsolete powers of purveyance and preemption; wilfully asserting that parliament has legislative authority without the king; sending a prisoner beyond seas; refusing to take the oaths of allegiance; impugning the act of settlement, or the authority of parliament to limit the succession; treating except of the election by the Scotch peers met to elect their representatives; promoting unwarrantable undertakings called "*bubbles*;" and assisting in the forbidden marriage of any of the royal family.

(*q*) See vol. I. p. 287.

(*r*) See vol. i. p. 138, vol. III. p. 137.

(4) Which was made perpetual by 39 Eliz. c. 18, sections 30 & 32, but which appears since 12 Ann. st. 2, c. 16, section 1, virtually to have expired.

(5) The latter of which requires the importation to be with the king's license; this is dispensed with, as regards Ireland by 46 Geo. III. c. 121.

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prisoner into parts beyond the seas. 8. By the statute 1 W. and M. st. 1, c. 8, persons of eighteen years of age, refusing to take the new oaths of allegiance, as well as supremacy, upon tender by the proper magistrate, are subject to the penalties of a *præmunire* (6); and by statute 7 and *8 W. III. c. 24, serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance and supremacy, and subscribed the declaration against popery, are guilty of a *præmunire*, whether the oaths be tendered or no. 9. By the statute 6 Ann. c. 7, to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended prince of Wales, or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown; such preaching, teaching, or advised speaking is a *præmunire*: as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. 10. By statute 6 Ann. c. 23, if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*. 11. The statute 6 Geo. I. c. 18, enacted in the year after the infamous south sea project had beggared half the nation, makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the names of bubbles, subject to the penalties of a *præmunire* (7). 12. The statute 12 Geo. III. c. 11, subjects to the penalties of the statute of *præmunire* all such as knowingly and wilfully solemnize, assist, or are present at, any forbidden marriage of such of the descendants of the body of king George II. as are by that act prohibited to contract matrimony without the consent of the crown (s).

Having thus inquired into the nature and several species

(s) See book I. c. 4.

(6) By the 31 Geo. III. c. 32, § 18, it is enacted, that no persons shall be summoned to take the oath of supremacy, or make the declaration against transubstantiation, or be prosecuted for not obeying the summons for

that purpose.—CH

(7) By stat. 6 Geo. IV., the major part of the provisions in the act are repealed, and illegal companies are rendered amenable to the common law.

of *præmunire*, its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by Sir Edward Coke (*t*): “that, from the conviction, the defendant shall be out of the king’s protection, and his lands and tenements, goods and chattels, forfeited to the king: and that his body shall remain in prison *at the king’s pleasure*; *or, as other authorities have it, *during life* (*u*):” both which amount to the same thing; as the king by his prerogative may any time remit the whole, or any part, of the punishment, except in the case of transgressing the statute of *habeas corpus*. These forfeitures, here inflicted, do not, by the way, bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, Sir Edward Coke adds, was this offence of *præmunire*, that a man that was attainted of the same might have been slain by any other man without danger of law; because it was provided by law (*w*), that any man might do to him as to the king’s enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage and mistaken notions (*x*), the statute 5 Eliz. c. 1, provides, that it shall not be lawful to kill any person attainted in a *præmunire*, any law, statute, opinion, or exposition of law to the contrary notwithstanding. But still such delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious soever, being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may suffer. And no man, knowing him to be guilty, can with safety give him comfort, aid, or relief (*y*) (8).

Punishment of
præmunire, for-
feiture of goods,
and imprison-
ment for life.

[*118]

(*t*) 1 Inst. 129.

(*u*) 1 Bulst. 199.

(*w*) Stat. 25 Edw. III. st. 5, c. 22.

(*x*) Bro. Abr. t. Corone, 196.

(*y*) 1 Hawk. P. C. 55.

(8) The terrible penalties of a *præmunire* are denounced by a great variety of statutes, yet prosecutions upon a *præmunire* are unheard of in our courts, for those statutes have all, happily, become obsolete.

There is only one instance of such a prosecution in the State Trials, in

which case the penalties of a *præmunire* were inflicted upon some quakers, for refusing to take the oath of allegiance in the reign of Charles the second; Harg. St. Tr. 2 vol. 463, where the court resorted to the most illegal and unjustifiable means for obtaining a conviction.

CHAPTER IX.

OF MISPRISIONS AND CONTEMPTS, AFFECTING THE KING AND GOVERNMENT.

Of misprisions
and contempts.

Misprisions are
offences against
the king and his
government, not
in themselves
capital, but in-
cluded in every
felony and
treason, divided
into two kinds,
negative and
positive.

THE fourth species of offences more immediately against the king and government, are entitled misprisions and contempts.

Misprisions, a term derived from the old French, *mespris* a neglect or contempt, are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon; and it is said, that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only (a). And upon the same principle, while the jurisdiction of the starchamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemeanour; as happened in the case of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Essex's rebellion (b). Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consists in the commission of something which ought not to be done.

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1. Negative as,
1. Misprision of
treason, which
may become
high treason.

*1. Of the first, or negative kind, is what is called *misprision of treason*: consisting in the bare knowledge and concealment of treason, without any degree of assent thereto: for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law: in like manner as the knowledge of a plot against the state, and not revealing it, was a capital crime at Florence, and other states of Italy (c). But it is now enacted by the statute 1 and 2 Ph. and Mar. c. 10, that a bare concealment of treason shall be only held a misprision.

(a) Yearb. 2 Rich. III. 10; Staundf. P. C. 37; Kel. 71; 1 Hal. P. C. 374; 1 Hawk. P. C. 55, 56.

(b) Hudson of the court of Star-chamber; MS. in Mus. Brit.

(c) Guicciard. Hist. b. 3 & 13.

This concealment becomes criminal, if the party apprized of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace (*d*). But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of actual high treason (*e*).

There is also one positive misprision of treason, created so by act of parliament. The statute 13 Eliz. c. 2, enacts, that those who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of misprision of treason (1). For, though the law would not put foreign coin upon quite the same footing as our own; yet, if the circumstances of trade concur, the falsifying it may be attended with consequences almost equally pernicious to the public: as the counterfeiting of Portugal money would be at present: and therefore the law has made it an offence just below capital, and that is all. For the punishment of misprision of treason is loss of the profits of lands during life, forfeiture of goods, and imprisonment during life (*f*) (2). Which total forfeiture of the goods was originally inflicted while *the offence amounted to principal treason, and of course included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter (*g*), that wherever an offence is punished by such total forfeiture it is felony at the common law. [**121*]

Misprision of *felony* is also the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessory. And the punishment of this, in a public officer, by the statute Westm. 1, 3 Edw. I. c. 9, is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and, in both, fine and ransom at the king's pleasure: which

(*d*) 1 Hal. P. C. 372.

(*e*) 1 Hawk. P. C. 56.

(*f*) 1 Hal. P. C. 374.

(*g*) See p. 94.

(1) Vide *ante* 89, in *notis*, where the existing law upon this subject is fully stated.

(2) This applies only to misprision of high treason; 1 Hale, 375.

2. Forging foreign coin, made misprision of treason by statute.

3. Misprision of felony.

pleasure of the king must be observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; "*voluntas regis in curia, non in camera* (h)."

4. Concealing treasure-trove.

There is also another species of negative misprisions: namely, the *concealing of treasure-trove*, which belongs to the king or his grantees by prerogative royal; the concealment of which was formerly punishable by death (i); but now only by fine and imprisonment (j).

II. Positive misprisions or contempts.

1. Mal-administration of public trusts, including peculation.

II. Misprisions, which are merely positive, are generally denominated *contempts* or *high misdemeanors*: of which

1. The first and principal is the *mal-administration* of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the *offence of *embezzling the public money*, called among the Romans *peculatus*, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person (k). With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment (3). Other misprisions are, in general, such

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(h) 1 Hal. P. C. 375.

(j) 3 Inst. 133.

(i) Glanv. l. 1, c. 2.

(k) Inst. 4, 18, 9.

(3) But now, by 2 W. IV. c. 4, § 1, repealing 50 Geo. III. c. 59, upon the same subject, "if any person employed in the public service of his Majesty, and entrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle the same, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever, except for the public service," he shall be guilty of felony, and liable to transportation for seven or fourteen years, or to imprisonment, with or without hard labour, not exceeding three years.

By sect. 2, the words "valuable

security" shall be deemed to include "every tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the united kingdom or of Great Britain, or of Ireland, or of any foreign state, or to any share or interest in any fund of any body corporate, company, or society, or to any deposit in any saving's bank, and every debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of this kingdom or of any foreign state, and every warrant or order for the delivery or transfer of any goods or valuable thing."

By sect. 3, three distinct acts of em-

contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government. These are

2. Contempts against the king's *prerogative*. As, by refusing to assist him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by personal service for defence of the realm, against a rebellion or invasion (*l*). Under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V. c. 8, which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel (*m*). Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, or doing or receiving any thing that may create an undue influence in favour of such intrinsic power; as, by taking a pension from any foreign prince without the consent of the king (*n*). Or, by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond the seas, (for disobedience to which, his lands shall be seized till he does return, and himself afterwards punished,) or by his writ of *ne exeat regnum*, or proclamation, commanding the subject to stay at home (*o*). Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned; for then it is punishable, like the rest of *these contempts, by fine and imprisonment, at the discretion of the king's courts of justice (*p*).

2. Contempts against the king's prerogative.

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3. Contempts and misprisions against the king's *person* and *government*, may be by speaking or writing against

3. Contempts against the king's person.

(*l*) 1 Hawk. P. C. 59.

(*m*) Lamb. Eir. 315.

(*n*) 3 Inst. 144.

(*o*) See vol. I. p. 266.

(*p*) 1 Hawk. P. C. 60.

bezzlement, if committed within six months, may be included in one indictment; and by § 5, offenders may be tried either in the county where apprehended, or in that where the offence

has been committed.

By stat. 7 & 8 Geo. IV. c. 29, § 5, provision is made in the case of stealing valuable securities by private individuals.

them, cursing or wishing him ill, giving out scandalous stories concerning him (4), or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die: these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory (5) or other infamous corporal punishment (q): in like manner as, in the ancient German empire, such persons as endeavoured to sow sedition, and disturb the public tranquillity, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The emperors Otho I. and Frederic Barbarossa inflicted this punishment on noblemen of the highest rank (r).

4. Contempts
against the
king's title.

4. Contempts against the king's *title*, not amounting to treason or *præmunire*, are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen (s) that it amounts to a *præmunire*. This heedless species of contempt is, however, punished by our law with fine and imprisonment. Likewise if any person shall in anywise hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemeanor, by statute 13 Eliz. c. 1, and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglecting to take the oaths, appointed by statute for the better securing the government; and yet *acting in a public office, place of trust, or other capacity, for which the said oaths are required to be taken; viz. those of allegiance, supremacy, and abjuration; which must be

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(q) 1 Hawk. P. C. 60.

(s) See page, 91.

(r) Mod. Un. Hist. xxix. 28, 119.

(4) As, asserting falsely of the king that he labours under the affliction of mental derangement, which is a criminal act, and indictable as a misdemeanor; *Rex v. Harvey*, 3 D. & R.

464; 2 B. & C. 257; see *post*, 150.

(5) Abolished by 56 Geo. III. c. 138, as to all offences except perjury and subornation of perjury.

taken within six calendar months after admission. The penalties for this contempt, inflicted by statute 1 Geo. I. st. 2, c. 13, are very little, if anything, short of those of a *præmunire*; being an incapacity to hold the said offices, or any other: to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender shall also forfeit 500*l.* to him or them that will sue for the same (6). Members on the foundation of any college in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register, within one month after: otherwise, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a person to succeed him by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon, and tender the oaths to, any person whom they shall suspect to be disaffected; and every person refusing the same, who is properly called a nonjuror, shall be adjudged a popish recusant convict, and subject to the same penalties that were mentioned in a former chapter (*t*); which in the end may amount to the alternative of abjuring the realm, or suffering death as a felon (7).

5. Contempts against the king's *palaces* or *courts of justice* have been always looked upon as high misprisions: and by the ancient law, before the conquest, fighting in the king's palace, or before the king's judges, was punished with death (*v*). So too, in the old Gothic constitution, there were many places privileged by law, *quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur, arces et aula regis, denique locus quilibet præsentē aut adventante rege* (*u*) (8). And at present, with us, by the

5. Contempts
against the
king's palaces.

(*t*) See p. 55.

7 & 34.

(*v*) 3 Inst. 140; LL. Alured. cap.

(*u*) Stiernh. de jure Goth. l. 3, c. 3.

(6) Vide *ante*, 59, (12) and following notes.

(7) Vide *ante*, 116.

(8) To which particular reverence and security were attached, as the tem-

ples and courts of justice, the courts and palaces of the king, and every place in which the king is actually present, or to which he was approaching.

[125] statute *33 Hen. VIII. c. 12, malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the king's pleasure; and also with the loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length (9) (10).

6. Contempts
against the
king's courts of
justice.

But *striking* in the king's superior courts of justice, in Westminster-hall, or at the assizes, is made still more penal than even in the king's palace. The reason seems to be, that those courts being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more; *viz.* the disturbance of public justice. For this reason, by the ancient common law before the conquest (*w*), striking in the king's court of justice, or drawing a sword therein, was a capital felony: and our modern law retains so much of the ancient severity as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life (*x*). A *rescue* also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual

(*w*) LL. Inæ. c. 6; LL. Canut. c. 56; LL. Alured. c. 7.

(*x*) Staund. P. C. 38; 3 Inst. 140, 141.

(9) Mr. Hargrave has given in the 11th vol. of the State Trials, p. 16, an extract from Stowe's Annals, containing a very curious account of the circumstances of the trial of Sir Edmund Knevet, who was prosecuted upon this statute, soon after it was enacted, "for which offence he was not onely judged to loose his hand, but also his body to remaine in prison, and his lands and goods at the king's pleasure. Then the said Sir Edmund Knevet desired that the king, of his benigne grace, would pardon him of his right hand, and take the left: for (quoth he) if my right is spared, I may hereafter doe such good service to his grace, as

shall please him to appoint. Of this submission and request the justices forthwith informed the king, who of his goodness, considering the gentle heart of the said Edmund, and the good report of lords and ladies, granted him pardon, that he should loose neither hand, land, nor goods, but should go free at liberty."—CH.

(10) So much of the 33 Hen. VIII. c. 12, (part of § 6 to § 18,) as relates to the punishment of manslaughter, and of malicious striking, by reason whereof blood shall be shed, is repealed by 9 Geo. IV. c. 31. As to manslaughter, generally, vide *post*, 191.

imprisonment, and forfeiture of goods, and of the profits of lands during life (*y*); being looked upon as an offence of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. For the like reason an affray, or riot, near the said courts, but out of their actual view, is punished only with fine and imprisonment (*z*) (11).

*Not only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment (*a*). And, even in the inferior courts of the king, an affray, or contemptuous behaviour, is punishable with a fine by the judges there sitting; as by the steward in a court-leet, or the like (*b*). [**126*]

Likewise all such, as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment; as if a man assaults or threatens his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty (*c*); which offences, when they proceeded further than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods (*d*).

(*y*) Hawk. P. C. 517.

(*z*) Cro. Car. 373.

(*a*) Ibid. 503.

(*b*) 1 Hawk. P. C. 58.

(*c*) 3 Inst. 141, 142,

(*d*) Stiernh. de jure Goth. l. 3, c. 3.

(11) Lord Thanet and others were prosecuted by an information filed by the attorney-general, for a riot at the trial of Arthur O'Connor and others for high treason under a special commission at Maidstone. Two of the defendants were found guilty generally.

The three first counts charged (*inter alia*) that the defendants did riotously make an assault on one J. R., and did then and there beat, bruise, wound, and ill-treat the said J. R. in the presence of the commissioners. When the

defendants were brought up for judgment, Lord Kenyon expressed doubts, whether upon this information the court was not bound to pronounce the judgment of amputation of the right hand, &c. as required in a prosecution expressly for striking in a court of justice. In consequence of these doubts the attorney-general entered a *noli prosequi* upon the three first counts, and the court pronounced judgment of fine and imprisonment as for a common riot; 1 East, P. C. 438.—CH.

Lastly, to endeavour to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute; all of which are impediments of justice, are high imprisonments, and contempts of the king's courts, and punishable by fine and imprisonment. And anciently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offence, if felony; and in treason, a principal. And at this day it is agreed, that he is guilty of a high misprision (*e*), and liable to be fined and imprisoned (*f*) (12) (13).

(*e*) See Barr. 212; 27 Ass. pl. 44,
§ 4, fol. 138.

(*f*) 1 Hawk. P. C. 59.

(12) A few years ago, at York, a gentleman of the grand jury heard a witness swear in court, upon the trial of a prisoner, directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumstance to the judge, who upon consulting the judge in the other court, was of opinion that public justice in this case required that the evidence which the witness had given before the grand jury should be disclosed, and the witness was committed for perjury to be tried upon the testi-

mony of the gentlemen of the grand jury. It was held, that the object of this concealment was only to prevent the testimony produced before them from being contracted by subornation of perjury on the part of the persons against whom bills were found. This is a privilege which may be waived by the crown; see p. 303, *post*.—CH.

(13) It appears that an attempt to stifle evidence is an indictable offence, on the principle that an incitement to commit crime is in itself criminal; 6 East, 464; 2 Stra. 904.

CHAPTER X.

OF OFFENCES AGAINST PUBLIC JUSTICE.

THE order of our distribution will next lead us to take into consideration such crimes and misdemeanors as more especially affect the *commonwealth*, or public polity of the kingdom: which, however, as well as those which are peculiarly pointed against the lives and security of private subjects, are also offences against the king, as the *pater-familias* of the nation; to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws, which the people themselves in conjunction with him have enacted; or at least have consented to, by an agreement either expressly made in the persons of their representatives, or by a tacit and implied consent presumed and proved by immemorial usage.

Of offences against the commonwealth. These are offences against the king also as the pater-familias of the nation.

The species of crimes, which we have now before us, is subdivided into such a number of inferior and subordinate classes, that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions or descriptions of this great variety of offences, and to the punishments inflicted by law for each particular offence; with now and then a few incidental observations: referring the student for more particulars to other voluminous authors; who have treated of these subjects with greater precision and more in detail, than is consistent with the plan of these commentaries.

The crimes and misdemeanors, that more especially affect the commonwealth, may be divided into five species; viz. as

*offences against public *justice*, against the public *peace*, against public *trade*, against the public *health*, and against the public *police* or *economy*; of each of which we will take a cursory view in their order.

They are divided into five species,

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I. Offences
against public
justice, which
are felonies,
as,

1. Embezzling,
vacating, or
falsifying
public records ;

First then, of offences against public *justice*: some of which are felonious, whose punishment may extend to death; others only misdemeanors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. Embezzling or vacating *records*, or falsifying certain other proceedings in a court of judicature, is a felonious offence against public justice. It is enacted by statute 8 Hen. VI. c. 12, that if any clerk, or other person, shall wilfully take away, withdraw, or avoid any record, or process in the superior courts of justice in Westminster-hall, by reason whereof the judgment shall be reversed or not take effect; it shall be felony not only in the principal actors, but also in their procurers and abettors (1). And this may be tried either in the king's bench or common pleas, by a jury *de medietate*; half, officers of any of the superior courts, and the other half common jurors. Likewise by statute 21 Jac I. c. 26, to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail (2), or judgment, in the name of another person not privy to the same, is felony without be-

(1) The 8 Hen. VI. c. 12, § 3, is now repealed by 7 & 8 Geo. IV. c. 27, by sect. 21 of which it is enacted, that "if any person shall steal, or shall for any fraudulent purpose, take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated, in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever, of or belonging to any court of equity, or relating to any cause or matter, begun, depending, or terminated in any such court, every such offender shall be guilty of a misdemeanor, and being convicted thereof,

shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value."

(2) The merely personating bail before a judge at chambers, or acknowledging bail in a false name, is only a misdemeanor, unless the bail are filed; 2 East, P. C. 109; and putting in bail in the name of a person not in existence is not within the act; 1 Stra. 304. The courts will not vacate the proceedings against the party personated, until the offender is convicted; T. Jones, 64; 1 Ventr. 501; 3 Keb. 694; 1 Ld. Rd. 445; and a conviction cannot take place until the bail-piece is filed; 2 Sid. 90.

nefit of clergy. Which law extends only to proceedings in the courts themselves: but by statute 4 W. and M. c. 4, to personate any other person, as bail, before any judge of assize or other commissioner authorized to take bail in the country, is also felony. For no man's property would be safe, if records might be suppressed or falsified, or persons' names be falsely usurped in courts, or before their public officers.

2. To prevent abuses by the extensive power, which the law is obliged to repose in gaolers, it is enacted by statute 14 Edw. III. c. 10, that if any *gaoler* by too great duress of imprisonment makes any prisoner, that he hath in ward, *become an *approver* or an *appellor* against his will; that is, as we shall see hereafter, to accuse and turn evidence against some other person; it is felony in the gaoler. For, as Sir Edward Coke observes (*a*), it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a gaoler, to whom the prisoner is committed for safe custody.

2. compelling prisoners to become approvers;

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3. A third offence against public justice is *obstructing* the execution of lawful *process*. This is at all times an offence of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal process. And it hath been holden, that the party opposing such arrest becomes thereby *particeps criminis*; that is, an accessory in felony, and a principal in high treason (*b*) (3). Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice,

3. obstructing the execution of legal process;

(*a*) 3 Inst. 91.

(*b*) 2 Hawk. P. C. 121.

(3) By 9 Geo. IV. c. 31, § 25, it is enacted, that where any person shall be charged with, and convicted of, as a misdemeanor, any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be appre-

hended or detained; the court may sentence the offender to be imprisoned, with or without hard labour, for any term not exceeding two years, and may also fine the offender, and require him to find sureties for keeping the peace. See 1 & 2 Geo. IV. c. 88, § 2; 3 Geo. IV. c. 114; 1 Burn's J., 230, et seq.

especially in London and Southwark, under the pretext of their having been ancient palaces of the crown, or the like (c): all of which sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by the statutes 8 and 9 Will. III. c. 27, 9 Geo. I. c. 28, and 11 Geo. I. c. 22, which enact, that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years: and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing or for having executed the same, shall be felons without benefit of clergy.

4. escapes which may be by the prisoner or by the gaoler, and if by the latter, may be negligent or voluntary;

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4. An *escape* of a person arrested upon criminal process, by eluding the vigilance of his keepers before he is put in hold, is also an offence against public justice, and the party himself *is punishable by fine or imprisonment (d). But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers therefore who, after arrest, *negligently* permit a felon to escape, are also punishable by fine (e); but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence (4): for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. And this whether he were actually committed to gaol, or only under a bare arrest (f). But the

(c) Such as White-Friers, and its environs; the Savoy; and the Mint in Southwark.

(d) 2 Hawk. P. C. 122.

(e) 1 Hal. P. C. 600.

(f) 1 Hal. P. C. 590; 2 Hawk. P. C. 134.

(4) If the officer, after an arrest, suffer the party to go at large upon promising to appear and find sureties, he cannot make any subsequent arrest,

by virtue of the same warrant, should the party make default; 2 Hawk. P. C. 130.

officer cannot be thus punished, till the original delinquent hath actually received judgment or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it might happen, that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor (*g*) (5).

5. Breach of prison by the offender himself, when committed for any cause, was felony at the common law (*h*): or even conspiring to break it (*i*). But this severity is mitigated by the statute *de frangentibus prisonam*, 1 Edw. II. which enacts, that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence. So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at the common law (6); and to break prison, whether it be the county gaol, the stocks, or other usual place of security, when lawfully confined upon any other inferior charge, is still *punishable as a high misdemeanor by fine and imprisonment. For the statute, which ordains that such offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment (*j*) (7).

5. breach of prison, the guilt of which is commensurate with the offence for which the party was imprisoned;

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(*g*) 1 Hal. P. C. 588, 9; 2 Hawk. P. C. 134, 5.

(*i*) Bract. l. 3, c. 9.

(*j*) 2 Hawk. P. C. 128.

(*h*) 1 Hal. P. C. 607.

(5) Persons aiding the escape of prisoners of war are guilty of felony and subject to transportation; see 52 Geo. III. c. 156. The offence is not complete if such prisoner is acting in concert with those under whose charge he is, merely to detect the defendant, and has no intention to escape; *Rex v. Martin*, R. & R. C. C. 196. To bail a person not bailable by law, is a negligent escape; Plowd. 476. To charge an officer with an escape, there must have been an actual and justifiable arrest and imprisonment; and the imprisonment must have been for some criminal matter, or the escape is not the

subject of indictment; see 1 Russell on Crimes, 367, et seq. As to escapes of persons under sentence of death by courts martial, see 37 Geo. III. c. 140, § 6; 6 Geo. IV. c. 5, § 13; 6 Geo. IV. c. 6, § 14, post (9).

(6) It seems the prisoner should actually effect an escape, or the breach of prison would not be construed a felony; 2 Hawk. c. 18, § 12.

(7) An actual breaking is the gist of this offence, and must be stated in the indictment. It must also appear that the party was lawfully in prison, and for a crime involving judgment of life or member; it is not enough to

6. rescue, the guilt of which is commensurate with that of the party rescued ;

6. Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment ; and it is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have *voluntarily* permitted an escape. A rescue therefore of one apprehended for felony, is felony ; for treason, treason ; and for a misdemeanour, a misdemeanour also (8). But here likewise, as upon voluntary escapes, the principal must first be attainted or receive judgment before the rescuer can be punished : and for the same reason ; because perhaps in fact it may turn out that there has been no offence committed (*k*) (9). By statute 11 Geo. II. c. 26, and 24 Geo.

(*k*) 1 Hal. P. C. 607 ; Fost. 344

allege that he " feloniously broke prison ;" 2 Inst. 591 ; 1 Russell, 381. If lawfully committed, a party breaking prison is within the statute, although he may be innocent ; as, if committed by a magistrate upon strong suspicion ; 2 Inst. 590 ; 1 Hale, P. C. 610 ; 1 Russell, 378. To constitute a felonious prison breach, the party must be committed for a crime which is capital at the time of the breaking ; 1 Russell, 379 ; *Cole's case*, Plowd. Comm. 401. A constructive breaking is not sufficient ; therefore, if a person goes out of prison without obstruction, as by a door being left open, it is only a misdemeanour ; 1 Hale, P. C. 611. An actual intent to break is not necessary. The statute extends to a prison in law, as well as to a prison in fact ; 2 Inst. 589. " Prison breach or rescue is a common law felony, if the prisoner breaking prison, or rescued, is a convicted felon, and it is punishable at common law by imprisonment, and under 19 Geo. III. c. 74, § 4, by three times whipping. Throwing down loose bricks at the top of a prison wall, placed there to impede escape and give alarm, is prison breach, though they were thrown down by accident ;" *Rex v. Haswell*, R. & R. C. C. 458.

(8) The mere prevention of an arrest of a person who has been guilty of felony, is looked upon only as a misdemeanour ; Hawk. b. 2, c. 21 ; 1 Chit. C. L. 62.

(9) By 1 & 2 Geo. IV. c. 88, (entitled an " Act to amend the Law of Rescue,") sect. 1, rescuing persons charged with felony, is punishable with seven years' transportation, or imprisonment for not less than one year, and not more than three years. And by § 2, assaulting any lawful officer, to prevent the apprehension or detainer of persons charged with felony, is punishable with two years' imprisonment in addition to other pains and penalties incurred, (*vide* also 5 Geo. IV. c. 84, § 22.) This section is repealed by 9 Geo. IV. c. 31, which, by section 25, provides a punishment for these offences ; *vide post*, 217. An indictment for a rescue must shew that the person rescued was lawfully in custody, and set out the writ and warrant ; 1 Stark. C. P. 156. An indictment for a rescue from a constable must state the charge made before the magistrate, the warrant and its delivery to the constable, and that the party was in custody under the warrant ; Archb. C. P. 309 ; *Rex v. Osmer*, 5 East, 304.

By 9 Geo. IV. c. 4, § 13, (entitled the Mutiny Act,) persons under sentence of death by court martial, having obtained a conditional pardon, escaping out of custody, and all parties aiding such escape, are punishable as felons ; see *Rex v. Stanley*, R. & R. C. C. 432.

II. c. 40, if five or more persons assemble to rescue any retailers of spirituous liquors, or to assault the informers against them, it is felony, and subject to transportation for seven years. By the statute 16 Geo. II. c. 31, to convey to any prisoner in custody for treason or felony any arms, instruments of escape, or disguise, without the knowledge of the gaoler, though no escape be attempted, or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and subjects the offender to transportation for seven years: or if the prisoner be in custody for petit larceny or other inferior offence, or charged with a debt of 100*l*. it is then a misdemeanour, punishable with fine and imprisonment (10). And by several special statutes (1), to rescue, or attempt to rescue, any person committed for the offences enumerated in those acts, is felony without benefit of clergy; and to rescue, or attempt to rescue, the body of a felon executed for murder, is single felony, and subject to transportation for seven years. Nay, even if any person be charged with any of the offences against the Black Act, 9 Geo. I. c. 22, and, being required by order *of the privy council to surrender himself, neglects so to do for forty days, both he and all that knowingly conceal, aid, abet, or succour him, are felons without benefit of clergy (11).

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(1) 6 Geo. I. c. 23 (Transportation); 9 Geo. I. c. 22 (Black Act); 8 Geo. II. c. 20 (Destroying Turnpikes, &c.); 19 Geo. II. c. 34, (Smuggling); 25 Geo. II. c. 37 (Murder); 27 Geo. II. c. 15 (Black Act).

(10) On an indictment under this Act, the offence of delivering instruments of escape to a prisoner has been held to be complete, though the prisoner had been pardoned of the offence of which he was convicted, on condition of transportation; and a party may be convicted, though there is no evidence that he knew of what offence the prisoner had been convicted; *Pex v. Shaw*, R. & R. C. C. 526. This Act applies only to cases of attempt; *Tilley's case*, 2 Leach, 662, and a case where the commitment is on suspicion only, is not within it; *Greenif's case*, 1 Leach, 363. This act appears virtually to be repealed by 4 Geo. IV.

c. 64, § 43, which makes delivering instruments of escape to any prisoner, whether he actually escape or not, a felony punishable by fourteen years' transportation.

(11) Some of these Acts, as far as they relate to the exclusion of benefit of clergy, and to the form of punishment, are altered and amended by 1 & 2 Geo. IV. c. 88, and 5 Geo. IV. c. 84.

By 4 Geo. IV. c. 54, § 1, to rescue a party in custody for an offence against the Black Act, 9 Geo. I. c. 22, is punishable only with transportation, or imprisonment and hard labour.

7. returning
from transporta-
tion ;

7. Another capital offence against public justice is the *returning from transportation*, or being seen at large in Great Britain, before the expiration of the term for which the offender was ordered to be transported, or had agreed to transport himself. This is made felony without benefit of clergy in all cases, by statutes 4 Geo. I. c. 11 ; 6 Geo. I. c. 23 ; 16 Geo. II. c. 15, and 8 Geo. III. c. 15, as is also the assisting them to escape from such as are conveying them to the port of transportation (12) (13).

8. taking a re-
ward to return
stolen goods ;

8. An eighth is that of *taking a reward*, under pretence of *helping* the owner to his *stolen goods*. This was a contrivance carried to a great length of villany in the beginning of the reign of George the first: the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners

(12) It has been thought that, where a convict has been pardoned upon condition of transporting himself for life or a certain number of years, if he did not comply with that condition, he might be remitted to his original sentence, and in some cases that he was subject to no other punishment ; see *Leach's Crown Cases*, 197, 303. But the 24 Geo. III. c. 56, seems to include every possible case, by enacting, that if any offender shall be ordered by the court to be transported, or shall agree to transport himself on certain conditions, either for life or any number of years, and shall be afterwards at large before the expiration of the term, without lawful cause, in any part of Great Britain or Ireland, he shall, being lawfully convicted thereof, suffer death without benefit of clergy.—CH.

(13) By 5 Geo. IV. c. 84, § 22, these provisions are re-enacted. By § 23, it shall be sufficient in any indictment for any offence previously mentioned, to allege the order made for the transportation, without alleging any indictment, trial, conviction, judgment or sentence, or any pardon, or intention of mercy, or signification thereof. And by § 24, the certificate of the clerk of the court where the offender was sentenced, containing the effect and substance only (omitting the

formal part) of the indictment and conviction of such offender, and of the order for his transportation, shall be sufficient evidence of such conviction and order for transportation. In *Rex v. Sutcliffe*, 1 Russell, 402, which was founded on 6 Geo. I. c. 23, § 7, which requires the officer to certify a transcript briefly, and in few words, containing the effect and tenor of the indictment and conviction ; and also on 24 Geo. III. c. 56, § 5, which requires a certificate containing the effect and substance only, omitting the formal part of the indictment and conviction ; the indictment stated, that the prisoner was convicted of grand larceny within benefit of clergy, and the certificate was in the same form ; and they were both held to be insufficient. So in *Rex v. Watson*, R. & R. C. C. 468, which was founded on 56 Geo. III. c. 27, § 8, which requires the certificate to contain the effect and substance only, omitting the formal part of the indictment and conviction, and order for transportation ; the indictment and certificate stated only that the prisoner had been convicted of felony, without stating the nature of the felony ; and they were both held to be insufficient, and the prisoner was remitted to his former sentence.

themselves, and thereby stifling all further inquiry. The famous Jonathan Wild had under him a well-disciplined corps of thieves who brought in all their spoils to him: and he kept a sort of public office for restoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by statute 4 Geo. I. c. 11, that whoever shall take a reward under the pretence of helping any one to stolen goods, shall suffer as the felon who stole them; unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against him. Wild, still continuing in his old practice, was upon this statute at last convicted and executed (*m*) (14).

9. Receiving of stolen goods, *knowing them to be stolen*, is also a high misdemeanour and affront to public justice. We have seen in a former chapter (*n*), that this offence, which is only a misdemeanour at common law, by the statutes 3 and 4 W. and M. c. 9, and 5 Ann. c. 31, makes the offender accessory to the theft and felony (15). But because the accessory

9. receiving
stolen goods;

(*m*) See stat. 6 Geo. I. c. 23, § 9.

(*n*) See p. 38.

(14) In *Rex v. Ledbitter*, R. & R. C. C. 76, a police officer was indicted under 4 Geo. I. c. 11, § 4, for taking money under the pretence of helping a person to goods stolen from him, and convicted of felony, though the officer had no knowledge of the felon, and though he possessed no power to apprehend the felon, and though the property was never restored, and the officer had no power to restore it.

By st. 7 & 8 Geo. IV. c. 29, § 58, it is enacted, "That every person who shall corruptly take any money or reward, directly or indirectly, under pretence, or upon account of helping any person, to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanour have been stolen, taken, obtained, or converted as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same,) be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be trans-

ported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit,) in addition to such imprisonment."

By sect. 59, advertising a reward for the return of any stolen property whatsoever, which shall have been stolen or lost, purporting that no questions shall be asked, or printing such advertisements, renders the offending party liable to a penalty of fifty pounds, and full costs, to any person who will sue for the same, by action of debt. This Act repeals the 25 Geo. II. c. 36, § 1, as far as relates to the advertising rewards for stolen goods.

The 4 Geo. I. c. 11, § 4, relating to, and the 1 Geo. IV. c. 115, directing the degree of punishment for this offence, are also repealed by this statute.

(15) The 3 & 4 W. & M., so far as

[*133] cannot in *general be tried, unless with the principal or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which, it is enacted by statute 1 Ann. c. 9, and 5 Ann. c. 31, that such receivers may still be prosecuted for a misdemeanour, and punished by fine and imprisonment, though the principal felon be not before taken so as to be prosecuted and convicted (16). And, in case of receiving stolen lead, iron, and certain other metals, such offence is, by statute 29 Geo. II. c. 30, punishable by transportation for fourteen years (*o*) (17). So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemeanour immediately, before the thief is taken (*p*); or to wait till the felon is convicted, and then punish them as accessories to the felony. But it is provided by the same statutes, that he shall only make use of one, and not both, of these methods of punishment. By the same statute also, 29 Geo. II. c. 30, persons having lead, iron, and other metals, in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemeanour and punishable by fine or imprisonment. And by statute 10 Geo. III. c. 48, all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well before as after the conviction of the principal, and whether he be in or out of custody; and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years (18).

(*o*) See also stat. 2 Geo. III. c. 28, of goods stolen by bumboats, &c. in the § 12, for the punishment of receivers Thames.

(*p*) Foster, 373.

regards this subject, is repealed by 7 & 8 Geo. IV. c. 27, and 5 Ann. c. 31 is repealed by 7 Geo. IV. c. 31, excepting some provisions relating to certain sheriffs.

(16) 1 Ann. c. 9, except § 3, is repealed by 7 & 8 Geo. IV. c. 27.

(17) Repealed by 7 & 8 Geo. IV. c. 27.

(18) By 1 & 2 Geo. IV. c. 75, § 1, pilots and others are to deposit anchors, cables, and other ships' materials found

by them, in places appointed by the Act; and concealing such articles forfeits all claim to salvage, and renders the offenders liable as receivers of stolen goods. By § 12, persons fraudulently purchasing or receiving such anchors, &c. shall be considered receivers of stolen goods. By § 15, pilots and others conveying such anchors, &c. to foreign parts, and there selling them, shall be guilty of felony, and punishable with seven years' transportation.

10. Of a nature somewhat similar to the two last is the offence of *theft-bote*, which is where the party robbed not

^{10.} theft-bote, or compounding of felony, which

And by § 22, offences against the Act shall be tried in the county where the goods are found, or if sold abroad, in the county where the person selling them resides. This Act was made to revive and continue two former temporary Acts of 49 & 53 Geo. III.

By 3 Geo. IV. c. 24, entitled "An Act for extending the Laws against Receivers of Stolen Goods, to Receivers of Stolen Bonds, Bank Notes, and other Securities for Money," all persons receiving or buying any exchequer order or tally, or any exchequer bill, bank note, South Sea bond, or any other security for money, knowing the same to have been stolen, are liable to be prosecuted as receivers of stolen goods, and to be punished according to the laws previously in force against offenders receiving stolen goods. The provisions of 2 Geo. II. c. 25, are made to extend to this Act.

Parties offending against this Act may be convicted either before or after the conviction of the principal offender.

By stat. 7 & 8 Geo. IV. c. 29, § 54, it is enacted, That if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of this Act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony; and, in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned

for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit,) in addition to such imprisonment: provided always, that no person, however tried for receiving, as aforesaid, shall be liable to be prosecuted a second time for the same offence.

By sect. 55, That if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by this Act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall, on conviction, be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice, publicly or privately whipped (if the court shall so think fit,) in addition to such imprisonment.

By sect. 56, all receivers, whether charged as accessories after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be tried at the same place as the principal, or where the property is found in their possession, or where they actually received such property.

And, by sect. 60, where the stealing or taking of any property whatsoever is by this Act punishable on summary conviction, either for every offence or for the first and second only, or for the first offence only, any person who shall receive any such property, knowing the

formerly made
the party an ac-
cessary;

[*134]

11. common
barretry, which
disqualifies from
practising in the
law;

only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute (19). This is frequently called compounding of felony, and formerly was held to make a man an accessory; but is now punished only with fine and imprisonment (*q*). This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law, "*latroni eum *similem habuit, qui furtum celare vellet, et occulte sine judice compositionem ejus admittere* (*r*) (20)." By statute 25 Geo. II. c. 36, even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50*l.* each (21).

11. Common *barretry* is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise (*s*) (22). The punish-

(*q*) 1 Hawk. P. C. 125.

(*s*) 1 Hawk. P. C. 243.

(*r*) Stiernh. de jure Goth. l. 3, c. 5.

same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is, by this Act made liable.

An indictment against a receiver, as accessory, must duly aver the guilt of the principal; but an indictment for a substantive felony need not allege the original felony, with either time or place; 1 Stark. C. P.; *Rex v. Scott*, 2 East, P. C. 781. An indictment for receiving stolen goods may be supported, if the nature of the property remain the same, although the name is changed; thus, a principal may be indicted for stealing a sheep, and an accessory for receiving some of the mutton; *Rex v. Cowell & Green*, 2 East, P. C. 781; and where an indictment charged the principal with stealing bank notes, the property of A., and the accessory with receiving the same

notes, the property and chattels of A., the word *chattels* was rejected as surplusage; *Morris's case*, Leach, 525.

The 29 Geo. II. c. 30, and 10 Geo. III. c. 48, respecting receivers, are, by 7 & 8 Geo. IV. c. 27, repealed, and also the 13 Geo. III. c. 31, § 4 & § 5; 21 Geo. III. c. 69; 22 Geo. III. c. 58; 3 Geo. IV. c. 24; and 3 Geo. IV. c. 114.

(19) Some particular favour should be shewn to the felon, to make the party amenable, as the mere receiving one's goods again can scarcely be sufficient to constitute the act a misdemeanor; 1 Hawk. c. 59, § 7.

(20) Considered as a thief him who attempted to conceal the theft, and to receive secret satisfaction for it, without bringing the offender to justice.

(21) The 25 Geo. II. c. 36, § 1, is repealed by 7 & 8 Geo. IV. c. 27; and see, on this subject, 7 & 8 Geo. IV. c. 29, § 59, *ante* note (14).

(22) Disturbing the peace, making false inventions, propagating evil reports and calumnies, and spreading

ment for this offence, in a common person, is by fine and imprisonment: but if the offender, as is too frequently the case, belongs to the profession of the law, a barretor, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future (*t*). And indeed it is enacted by statute 12 Geo. I. c. 29, that if any one, who hath been convicted of forgery, perjury, subornation of perjury, or common barretry, shall practise as an attorney, solicitor, or agent, in any suit; the court, upon complaint, shall examine it in a summary way; and, if proved, shall direct the offender to be transported for seven years. Hereunto may also be referred another offence, of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff: either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by statute 8 Eliz. c. 2, to be punished by six months' imprisonment, and treble damages to the party injured.

12. Maintenance is an offence that bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it (*u*): a practice that was greatly encouraged by the first introduction of uses (*w*). This is an offence against public justice, as *it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And

12. maintenance, which was encouraged by the first introduction of uses;

[*135]

(*t*) 1 Hawk. P. C. 244.

(*w*) Dr. & St. 203.

(*u*) Hawk. P. C. 249.

false and groundless rumours, whereby discord and disquiet may ensue amongst neighbours, may properly be ranked under the head Barretry; 1 Inst. 368; 1 Hawk. P. C. 243. See 1 Hale, P. C. c. 27; Bac. Abr. barretry; 1 Russell, 185, on this subject. See also the case of barretry, 8 Co. Rep. 36, b. No one can be convicted for a single act of barretry, for every indictment for that offence must charge the defendant with

being a *common* barretor. In a late case in the King's Bench, where an attorney, without any corrupt or unworthy motive, prepared a special case in order to take the opinion of the court upon the will of a testator, and suggested several facts which had no foundation, he was held to be guilty of a contempt, and fined 30*l*. *In re Elsam*, 5 D. & R. 389; 3 B. & C. 597.

therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or patronage (*x*). A man may, however, maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion with impunity. Otherwise the punishment by common law is fine and imprisonment (*y*); and by the statute 32 Hen. VIII. c. 9, a forfeiture of ten pounds (23).

13. champerty, a species of maintenance, confined chiefly to civil suits;

13. Champerty, *campi-partitio*, is a species of maintenance, and punished in the same manner (*z*): being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expence (*a*). Thus *champart*, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law; because no man should purchase any pretence to sue in another's right. These pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law: "*qui improbe cœunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur* (*b*) (24); and they were pu-

(*x*) Ff. 48, 10, 20.

(*y*) 1 Hawk. P. C. 255.

(*z*) Ibid. 257.

(*a*) Stat of Conspirat. 35 Edw. I.

(*b*) Ff. 48, 7, 6.

(23) See 1 Hawk. P. C. c. 3; Co. Litt. 368; 1 Russell, 176, on this subject. The distinction between maintenance and champerty seems to be this: where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but, where he stipulates to receive part of the thing in suit, he is guilty of champerty. It seems that resorting to

machinery and contrivances in order to make a party interested in a suit a witness on the trial, amounts to maintenance; *Bell v. Smith*, 7 D. & R. 846; 5 B. & C. 188.

(24) Those who dishonestly interfere in other men's suits for the purpose of sharing in the benefit that may be derived from them.

nished by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto also must be referred the provision of the statute 32 Hen. VIII. c. 9, that no one shall sell or purchase any pretended right or title to land, unless the vender *hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder; on pain that both purchaser and vender shall each forfeit the value of such land to the king and the prosecutor (25). These offences relate chiefly to the commencement of *civil* suits: but

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(25) One who has only a *bare* right to lands, as a disseisee before entry, comes within this statute, Co. Litt. 369, a. There are other statutes upon this subject not adverted to by the learned judge. By 3 Edw. I. c. 25, "no officers of the king, by themselves nor by others, shall maintain pleas, suits, or matters, hanging in the king's courts, for lands, tenements, or other things, for to have part or profit thereof by covenant made between them; and he that doth shall be punished at the king's pleasure." The courts contemplated by this statute have been held to be courts of Record only. The word "covenant" comprehends all kinds of promises and contracts made with this intent; and an agreement to share the debt or damages in a personal action, is as much an offence as an agreement to divide the land in a real action. A grant of rent out of the lands in question is within the statute, though a grant of rent out of other lands is not, and a grant of part of the thing in suit, made in respect of a *bonâ fide* pre-existing debt, is not within the statute; 1 Russell, 179. By 13 Edw. I. c. 49, "the chancellor, treasurer, justices, nor any of the king's counsel, no clerk of the chancery, nor of the Exchequer, nor of any justice or other officer, nor any of the king's house, clerk ne lay, shall not receive any church, nor advowson of a church land, nor tenement in fee, by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before

any of our officers, nor shall take no reward thereof. And he that doth contrary to this act, either himself or by any other, or make any bargain, shall be punished at the king's pleasure, as well he that purchaseth, as he that doth sell." This Act has been held to apply only to the officers specifically named in it; 1 Russell, 180. By 28 Edw. I. st. 3, c. 11, "nothing shall be taken to maintain any matter in suit. The king will that no officer, nor any other, (for to have part in the things in plea,) shall not take upon him the business that is in suit; nor none, upon any such covenant, shall give up his right to another; and if any do, and he be attainted thereof, the taker shall forfeit unto the king so much of his lands and goods as doth amount to the value of the part that he hath purchased for such maintenance." It seems that champerty, in any action at law, would be within this statute; and that to purchase land, pending a suit in equity respecting it, would amount to such champerty; 1 Rus. 181. By 33 Edw. I. st. 3, "Whereas it is contained in our statute, that none of our courts shall take any plea to champerty by craft nor by engine, and that no pleaders, apprentices, attorneys, stewards of great men, bailiffs, nor any other of the realm, shall take for maintenance, or the like bargain, any manner of suit or plea against other, whereby all the realm is much grieved, and both rich and poor troubled in divers manners, it is provided by common accord, that all such as shall from hence-

14. compound-
ing prosecutions
on penal sta-
tutes, a similar
offence to the
last, but con-
fined to criminal
causes;

14. The *compounding of informations* upon penal statutes is an offence of an equivalent nature in *criminal* causes; and is, besides, an additional misdemeanor against public justice, by contributing to make the laws odious to the people. At once therefore to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it is enacted by statute 18 Eliz. c. 5, that if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (26), which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good (27), he shall forfeit 10*l.*, shall stand two hours on

forth be attainted of such emprises, suits, or bargains, and such as consent thereunto, shall have imprisonment of three years, and shall make fine at the king's pleasure." These statutes were all referred to and confirmed by 4 Edw. III. c. 11, & 32 Hen. VIII. c. 9, which enacted, that whereas the former statutes provided redress for this evil in the court of King's Bench only, from thenceforth it should be lawful for justices of the Common Pleas, justices of assize, and justices of the peace in their quarter sessions, to inquire, hear, and determine, this and such like cases, as well at the suit of the king, as of the party. Champerty, however, is clearly an offence at common law; see 2 Inst. 208; 1 Hale, P. C. 145; 1 Hawk. P. C. 463. If B. and C. are creditors of A., and B., having instituted proceedings against A., agrees with A. to abandon those proceedings, and give up his securities in consideration of A. giving him a lien upon other securities in the hands of C., with authority to sue C: this is not champerty, but a mere agreement that A. shall assign his equity of redemption in the securities held by C., in exchange for the securities held by B; *Hartley v. Russell*, 2 S. & S. 244. But, if an attorney agrees to maintain a suit, upon an un-

derstanding that in the event of success his client shall make a beneficial conveyance to him of the thing in suit; this is champerty; *Wood v. Downes*, 18 Vesey, 120. If an attorney follow a cause to be paid in gross when the thing in suit is recovered, it has been adjudged that this is champerty; *Hob.* 117. Every champerty implies maintenance; but every maintenance is not champerty; *Crom. Jur.* 39, 2 Inst. 208. And see *Jacob's Law Dictionary*, titles Champerty and Maintenance, for general information upon this subject.*

(26) It has been held that a person is liable to the prescribed punishment of this Act, for taking a penalty imposed by a penal statute, though there are no proceedings pending for recovering the penalty; *Rex v. Gotley*, R. & R. C. C. 84.

This statute does not apply to offences cognizable only before magistrates. *Rex v. Crisp*, 1 B. & A. 282. See further on this subject, *Rex v. Southerton*, 6 East, 126; 2 Smith, 305; 1 Russell, 135.

(27) This severe statute extends even to penal actions, where the whole penalty is given to the prosecutor.

To compound a felony is a misdemeanor punishable as misdemeanors in general, by fine and imprisonment at the discretion of the court; See *ante*, p. 133.

* See *Williams v. Protheroe*, 3 Y. & J. 129.

the pillory (28), and shall be for ever disabled to sue on any popular or penal statute.

15. A conspiracy also to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted, is a further abuse and perversion of public justice; for which the party injured may either have a civil action by writ of conspiracy (29), of which we spoke in the preceding book (c), or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the ancient common law (d) to receive what is called the *villinous* judgment; viz. to lose their *liberam legem*, whereby they are discredited and disabled as jurors or witnesses (30); to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison (e). But it now is the better opinion, that the villinous judgment is by long *disuse become obsolete: it not having been pronounced for some ages: but instead thereof the delinquents are usually sentenced to imprisonment, fine, and pillory (31) (32). To this head may be referred the offence of sending

15. conspiracy to indict, and sending threatening letters in order to extort money; the villinous judgment formerly passed on conspirators is now obsolete;

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(c) See vol. III. pag. 126.

(e) 1 Hawk. P. C. 193.

(d) Bro. Abr. tit. Conspiracy, 28.

To compound a penal action without leave of the court is an offence, which must be punished as the statute directs.

But it is no offence to compound a misdemeanor, for in every case of misdemeanor the person injured may maintain an action to recover a compensation in damages.

(28) By 56 Geo. III. c. 138, this punishment is removed from all offences, except perjury and subornation of perjury.

(29.) An action on the case for a malicious prosecution seems to be more resorted to, and the most profitable, as the old writ of conspiracy could only be sustained where the actual life of the party had been involved; 2 Sel. N. P. 1054; 1 Saund. 230; 1 Ld. Rd. 379.

(30) But, whether a conviction for a conspiracy to commit a fraud, disquali-

fies the convict from giving evidence in a court of justice, *quære*. Such a witness was once admitted, per *Abbott*, C. J. at nisi prius, *doubtingly*; *Crowther v. Hopwood*, D. & R. N. P. C. 5. It has been decided, that a plaintiff convicted of a conspiracy, is not incompetent to make an affidavit to hold a defendant to bail; *Park v. Strockley*, 4 D. & R. 144. But a judgment for a conspiracy to bribe a person (summoned as a witness on an information against the revenue laws) not to appear before the justices, renders the person convicted incompetent as a witness; *Bushel v. Barrett*, 1 R. & M. 434.

(31) As to the pillory, vide ante note (29), &c. As to giving judgment against persons convicted of conspiracy, vide *Rex v. Cooke*, 7 D. & R. 673; 5 B. & C. 538.

(32) Every confederacy to injure

letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable by statute 30 Geo. II. c. 24, at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years (33).

individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy. Journeymen who refuse to work, in consequence of a combination, till their wages are raised, may be indicted for a conspiracy; 1 *Leach, Hawk.* 348. But by the 40 Geo. III. c. 106, any two justices of the peace have cognizance of offences of this kind, and may upon conviction punish the offenders by imprisonment in the county gaol for three months, or by imprisonment and hard labour in the House of Correction for two months. Though it is legal for one journeyman or servant to refuse to work, unless he is paid the wages he demands, yet a combination of two or more to raise their wages becomes criminal.* So a combination of two or more masters to lower the wages of their servants would be equally criminal. One person alone cannot be guilty of a conspiracy; but one person may be prosecuted for having conspired with others, and may be tried and convicted alone; 1 *Str.* 193. In a prosecution for a conspiracy, the actual fact of conspiring need not be proved, but it may be inferred from circumstances and the concurring conduct of the defendants; 1 *Bl. Rep.* 392. In the case of William Stone, who was indicted for high treason, *viz.* for compassing the death of the king, and for adhering to his enemies, the overt act to which the evidence chiefly applied was the conspiring with John Stone, William Jackson, and others unknown, to collect intelligence, and to communicate it to

the enemy for their aid and instruction. And the attorney-general advanced this position, which was admitted by the court; "that, as the overt act charged was a conspiracy, of which proof was already before the court, the act of each conspirator in the prosecution of such conspiracy was evidence against all; that it had been so determined by Mr. J. Buller, in the case of the *King v. Bowes* and others, who were convicted for a conspiracy to carry away Lady Strathmore; and that the same principle had been also settled in the *King v. Hardy*, and the *King v. Tooke*, at the Old Bailey, in 1794." A conspiracy has been said to be comprehended under the denomination of *crimen falsi*, and a person convicted of it is held to be rendered an incompetent witness; *Leach*, 349. But this is only true of conspiracies, the object of which is to injure by fraud, falsehood, or perjury; for Mr. Bowes and the others convicted with him were afterwards held to be competent witnesses by the court of delegates.—CH.

(33) The statute now in force upon this subject is the 7 & 8 Geo. IV. c. 29, by sect. 8 of which, persons sending letters containing menacing demands, or threatening to accuse a party of any crime, punishable with death, transportation, or pillory, or of any other infamous crime, to extort money, shall be guilty of felony, and, on conviction thereof, be liable, at the discretion of the court, to transportation for life, or not less than seven years, or imprison-

* See *Rex v. Ridgway*, 1 D. & R. 132; 5 B. & A. 527, upon this subject.

16. The next offence against public justice is when the suit is past its commencement, and come to trial. And that is the crime of wilful and corrupt *perjury*; which is defined by Sir Edward Coke (*f*), to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully, absolutely, and falsely*, in a matter *material* to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them (34). For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary *affidavit* in any extra-judicial matter, as is now too frequent upon every petty occasion (35); since it is more than possible, that by such idle oaths a man may frequently *in foro conscientiae* incur the guilt, and at the same time evade the temporal penalties, of perjury. The perjury must also be corrupt, (that is, committed *malo animo*,) wilful, positive, and absolute; not upon surprize, or the like; it also must be in some point material to the question in dispute (36); for if it

16. perjury and subornation thereof, which are punishable both at common law and by statute;

(*f*) 3 Inst. 164.

ment for any term not exceeding four years; and, if males, to one, two, or three public whippings, in addition to such imprisonment. Sect. 9 defines what shall be deemed an infamous crime.

Sending a letter threatening to accuse the prosecutor of having made overtures to the prisoner to commit sodomy with him, does not threaten to charge such an infamous crime as to be within the Act; *Rex v. Hickman*, R. & M. C. C. 34. But see *Rex v. Wagstaffe*, R. & R. C. C. 398; *Rex v. Paddle*, Id. 484.

(34) Where an oath is required by an act of parliament, but not in a judicial proceeding, the breach of that oath does not seem to amount to perjury, unless the statute enacts that such

oath, when false, shall be perjury, or shall subject the offender to the penalties of perjury.

It is remarkable that the house of commons have no power to administer an oath, except in those particular instances in which that power is granted to them by express acts of parliament. It is supposed that the reason they have never obtained the general authority of administering an oath, is owing to the jealousy of the upper house, which, by securing this privilege to itself, prevents the commons from participating in the judicature of parliament.—CH.

(35) The evil here so justly complained of is now remedied by statute 5 & 6 W. IV. c. 62, to which the reader is referred.

(36) Vide Lord Mansfield's decision

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only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned (37). *Subornation* of perjury is the offence of procuring another to *take such a false oath as constitutes perjury in the principal (38). The punishment of perjury and subornation, at common law, has been various. It was anciently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony (g). But the statute 5 Eliz. c. 9, if the offender be prosecuted thereon, inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the suborner: and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months' imprisonment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common law; especially as, to the penalties before inflicted, the statute 2 Geo. II. c. 25, superadds a power, for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period; and makes it felony without benefit of clergy to return or escape within the time (39). It has sometimes been wished, that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation: as it is in all cases by the laws of France (h). And certainly the odiousness of the crime pleads strongly in behalf of the French law. But it is to be considered, that

(g) 3 Inst. 163.

(h) Montesq. Sp. L. b. 29, c. 11.

in *Rex v. Aylett*, 1 T. R. 69. But it seems, if circumstantially material, it will be perjury; 1 Ld. Raym. 258. See *Rex v. Dunn*, 1 D. & R. 10; *Pippett v. Hearn*, id. 266; 5 B. & A. 634; *Rex v. Harris*, 1 D. & R. 578; 5 B. & A. 296; *Rex v. Thomas*, 3 D. & R. 621; 1 *Harrison's Digest*, 804, title Perjury. For the various statutes upon this subject see *Collyer's Criminal Statutes*, 468, title Perjury, and the notes thereon.

(37) A man may be indicted for perjury in swearing that he *believes* a fact to be true, which he must know to be false; Leach, 270.

(38) If the party suborned doth not take such an oath, the person who incited him to commit perjury, is liable to be fined, and to suffer infamous corporal punishment; 2 Hawk. c. 69, § 3.

(39) This statute, as relates to this offence, is repealed by 7 & 8 Geo. IV. c. 27.

there they admit witnesses to be heard only on the side of the prosecution, and use the rack to extort a confession from the accused. In such a constitution therefore it is necessary to throw the dread of capital punishment into the other scale, in order to keep in awe the witnesses for the crown; on whom alone the prisoner's fate depends; so naturally does one cruel law beget another. But corporal and pecuniary punishments, exile, and perpetual infamy, are more suited to the genius of the English law: where the fact is openly discussed between witnesses on *both* sides, and the evidence for the crown may be contradicted and disproved by those of the prisoner. Where *indeed the death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment: which our ancient law in fact inflicted (*i*). But the mere attempt to destroy life by other means not being capital, there is no reason that an attempt by perjury should; much less that this crime should in *all* judicial cases be punished with death. For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and, detestable as perjury is, it is not by any means to be compared with some other offences, for which only death can be inflicted; and therefore it seems already, except perhaps in the instance of deliberate murder by perjury, very properly punished by our present law, which has adopted the opinion of Cicero (*k*), derived from the law of the twelve tables, "*perjurii poena divina, exitium; humana, dedecus* (40) (41) (42)."

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(i) Britton, c. 5.

(k) De Leg. 2, 9.

(40) The Divine sentence upon perjury is death, the human punishment for it is disgrace.

(41) The 23 Geo. II. c. 11, empowers any judge of assize, while the court is sitting, or within twenty-four hours after, to order any witness to be indicted for perjury, and to assign counsel to the prosecutor free of expence; such prosecution to be conducted without any fees or duties whatsoever. The same Act provides, that in *any* prosecution for perjury, it shall suffice to set forth in the indictment

the *substance* of the offence, and the court, or the person before whom the oath was taken, averring that such court or person had competent jurisdiction to administer such oath, and that the matter whereon the perjury is assigned was false, without setting forth the previous record or proceedings, or the commission or jurisdiction of such court or person.

(42) See the note on perjury generally, and the various statutes against perjury on particular subjects, in *Collyer's Criminal Statutes*, 468 to 494.

17. bribery,
which is the of-
fering, or taking
a bribe, to pre-
vent the due
course of
justice;

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17. Bribery is the next species of offence against public justice; which is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office (*l*). In the east it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries; where the true principles of government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for selling a man's vote in the senate or other public assembly, as for the bartering of common justice, yet, by a strange indulgence in one instance, it tacitly encouraged this practice; allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the year (*m*): not considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic (*n*), *orders those who take presents for doing their duty, to be punished in the severest manner: and by the laws of Athens he that offered, was also prosecuted as well as he that received, a bribe (*o*). In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same (*p*). But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence, that the chief justice Thorpe was hanged for it in the reign of Edward III. By a statute (*q*) 11 Hen IV. all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice (43).

(*l*) 1 Hawk. P. C. 168.

(*m*) Ff. 48, 11, 6.

(*n*) De Leg. 1. 12.

(*o*) Port. Antiq. b. 1, c. 23.

(*p*) 3 Inst. 147.

(*q*) 3 Inst. 146.

(43) It was held to be a misdemeanor to offer a sum of money to the first

lord of the treasury, for the purpose of obtaining an office or appointment un-

18. Embracery is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like (*r*). The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is, by divers statutes of the reign of Edward III. perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value (44).

18. embracery, or an attempt corruptly to influence a juror;

19. The *false verdict* of jurors, whether occasioned by embracery or not, was anciently considered as criminal, and therefore exemplarily punished by attain in the manner formerly mentioned (*s*) (45).

19. false verdict, which was anciently criminal, whether produced by embracery or not;

20. Another offence of the same species is the *negligence of public officers*, intrusted with the administration of justice, as sheriffs, coroners, constables, and the like: which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one (*t*). Also the omitting to apprehend persons, offering stolen *iron, lead, and other metals to sale, is a misdemeanour, and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 Geo. II. c. 30 (46).

20. negligence of public officers;

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21. There is yet another offence against public justice, which is a crime of deep malignity; and so much the deeper,

21. oppression by magistrates;

(*r*) 1 Hawk. P. C. 259.

(*t*) 1 Hawk. P. C. 168.

(*s*) See vol. III. p. 402, 403.

der government, by his interest and recommendation; 4 Burr. 2,498. For bribery at elections, see 1 vol. p. 179.* —CH.

(44) By stat. 6 Geo. IV. c. 50, § 61, the offence of embracery of jurors, and jurors wilfully and corruptly consenting thereto, is punishable by fine and imprisonment.

This statute repeals those of 5 Edw. III. c. 10; 34 Edw. III. c. 8, and 38 Edw. III. c. 12, whereon the action of

decies tantum was founded. For the definition of this offence, and instances of it, see 1 Hawk. P. C. 259; 1 Russell, 183.

(45) The writ of attain against jurors is now utterly abolished by the 6 Geo. IV. c. 50, § 60; and, by § 61, they are rendered punishable for misconduct by another mode; Vide *ante*, note (44), *post*, 361.

(46) Repealed by 7 & 8 Geo. IV. c. 27.

* See *Talmash* q. t. v. *Gardiner*, 1 D. & R. 512; *Huntingtower* v. *Ireland*, 2 D. & R. 450; 1 B. & C. 297; the statutes 34 Edw. III. c. 1; 7 & 8

W. III. c. 4; 2 Geo. II. c. 24; 49 Geo. III. c. 118, and 6 Geo. IV. c. 108; 1 Russell, 156, et seq.; on this subject.

as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression* and tyrannical partiality of judges, justices, and other *magistrates*, in the administration and under the colour of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of King's Bench, according to the rank of the offenders, it is sure to be severely punished with forfeiture of their offices, either consequential or immediate, fines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed (47).

22. extortion

22. Lastly, *extortion* is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due (*u*). The punishment is fine and imprisonment, and sometimes a forfeiture of the office (48).

(*u*) 1 Hawk. P. C. 170.

(47) On motions for informations against magistrates, the question is, not whether the act done might on full investigation be found to be strictly right, but whether it proceeded from oppressive, dishonest, or corrupt motives (under which fear and favour may generally be included), or from mistake, or error; in either of the latter cases, the court will not grant a rule; *Rex v. Barron*, 3 B. & A. 432. That case seems to lay down the general rule upon this subject clearly and definitively. For other decisions, see *Rex v. Cozens*, 2 Doug. 426; *Rex v. Doire*, id. 588; *Rex v. Seaford*, 1 W. Bl. 432; *Rex v. Jackson*, Lofft. 147; *Rex v.*

Staffordshire (Justices), 1 Chit. R. 219; *Rex v. Jackson*, 1 T. R. 653; *Anonymous*, 1 Chit. R. 217; *Rex v. Brooke*, 2 T. R. 190; *Rex v. Davis*, Lofft. 62; *Rex v. Jones*, 1 Wils. 7; *Rex v. Somersetshire* (Justices), 1 D. & R. 443; *Rex v. Lancashire* (Justices), id. 485; *Rex v. Fielding*, 2 Burr. 719; *Rex v. Harris*, 3 Burr. 1716; *Rex v. Williams*, id. 1317; *Rex v. Constable*, 7 D. & R. 663; *Paley on Convictions*, 2d Edw. by Dowling, 349.

(48) See, generally upon this subject, Bac. Abr. Fees; *Jacob's Law Dict.* Extortion; *Harrison's Digest*, tit. Officers, Sheriff; 1 Chit. Stat. Extortion, and the cases there collected.

CHAPTER XI.

OF OFFENCES AGAINST THE PUBLIC PEACE.

WE are next to consider offences against the public *peace*: the conservation of which is intrusted to the king and his officers, in the manner and for the reasons which were formerly mentioned at large (a). These offences are either such as are an actual breach of the peace: or constructively so, by tending to make others break it. Both of these species are also either felonious, or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes: and, particularly,

Offences against the public peace are, actual, or constructive; and felonious, or not felonious; the felonious made so by modern statutes.

1. The *riotous assembling* of *twelve* persons, or more, and not dispersing upon proclamation. This was first made high treason by statute 3 and 4 Edw. VI. c. 5, when the king was a minor, and a change in religion to be effected; but that statute was repealed by statute 1 Mar. c. 1, among the other treasons created since the 25 Edw. III.; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar. st. 2, c. 12, which made the same offence a single felony. These statutes specified and particularized the nature of the riots they were meant to suppress; as, for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of Mary made felony, but within the benefit of clergy: and *also the act indemnified the peace officers and their assistants, if they killed any of the mob in endeavouring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was like to produce great discontents: but at first it was made only for a year, and was afterwards

1. Riotous assemblies to the number of twelve; formerly high treason, now felony;

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(a) Vol. I. p. 118, 268, 350.

continued for that queen's life. And, by statute 1 Eliz. c. 16, when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of James the first to the death of queen Anne, it was never once thought expedient to revive it: but, in the first year of George the first, it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I. c. 5, enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, undersheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And further, if the reading of the proclamation be by force opposed, or the reader be in any manner wilfully hindered from the reading of it, such opposers and hinderers are felons without benefit of clergy: and all persons to whom such proclamation *ought to have been made*, and knowing of such hinderance, and not dispersing, are felons without benefit of clergy (1). There is the like indemnifying clause, in case

(1) If in reading the proclamation from the Riot Act the magistrate omit to read the words "God save the King" at the end of it, persons remaining together an hour after such reading of the proclamation cannot be capitally convicted under the first section of that Act; *Rex v. Child*, 4 C. & P. 442.

If an indictment on the same section, for remaining assembled an hour after proclamation, in setting out the proclamation, omit the words "of the reign of," which were contained in the proclamation read by the magistrate; this is a fatal variance; *Rex v. Woolcock*, 5 C. & P. 516.

If the proclamation be read several times, the hour is to be computed from the first reading; *Ibid.*

If there be such an assembly that there would have been a riot if the parties had carried their purpose into effect, this is within the statute; and whether there was a cessation or not, is a question for the jury; *Id.*

An indictment for remaining assembled an hour after proclamation made, need not charge the original riot to have been in *terrorem populi*; *Rex v. James*, 5 C. & P. 153.

A riot is not less a riot, nor an illegal meeting less an illegal meeting, because the proclamation from the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but if that proclamation be not read, the common law offence remains, which

any of the mob be unfortunately killed in the endeavour to disperse them; being copied from the act of queen Mary. And, by a subsequent clause of the new act, if any persons, so riotously assembled, begin even before proclamation to pull down any church, chapel, meeting-house, dwelling-house, or outhouses, they shall be felons without benefit of clergy (2).

is a misdemeanor; and all magistrates, constables, and even private individuals are justified in dispersing the offenders, and if they cannot otherwise succeed in doing so, they may use force; *Rex v. Furney*, 6 C. & P. 81.

(2) These provisions were, by subsequent statutes, extended to every description of mills and the works attached to them; to buildings or machinery for carrying on any kind of trade or manufacture, or for warehousing goods or merchandize; and to houses, shops, and buildings, with the fixtures, furniture, goods, and commodities whatsoever contained therein.

And now by 7 & 8 Geo. IV. c. 30, § 8, it is provided, that if any persons, riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered, or recorded, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any machinery, fixed or moveable, prepared for or employed in any manufacture, or any steam-engine, or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony,

and, on conviction, shall suffer death as a felon.

It is not a "beginning to demolish" a house within this statute, unless the jury are satisfied that the ultimate object of the rioters was to demolish the house, and that if they had carried their intention into full effect, they would, in point of fact, have demolished it; *Rex v. Thomas*, 4 C. & P. 237.

An indictment on this statute for feloniously beginning to demolish a house, cannot be supported unless the persons committing the outrage had an intention of destroying the house; and therefore, where considerable damage was done to a house by a mob, who did this with an intention of seizing a person who had taken refuge in the house, this was held to be not within the statute; *Rex v. Prior*, 5 C. & P. 510.

But where a party of coal-whippers, having ill-will towards a coal-lumper, who paid less than the usual wages, created a mob, and riotously went to the house where he kept his pay-table, and cried out that they would murder him, and threw stones, and broke windows and partitions, and part of a wall, till they were compelled to desist by the police; it was held that they might be convicted of beginning to demolish under this statute, though their principal object was to injure the prosecutor, provided it was also their object to demolish the house, either on account of its being used by him, or by his men, though they had no ill-will against the owner of the house personally; *Rex v. Batt*, 6 C. & P. 329.

2. appearing armed, or hunting in disguise, a felony ;

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2. By statute 1 Hen. VII. c. 7, *unlawful hunting* in any legal forest, park, or warren, not being the king's property, **by night*, or with *painted faces*, was declared to be single felony. But now by the statute 9 Geo. I. c. 22, to appear armed in any enclosed forest or place where deer are usually kept, or in any warren for hares or conies, or in any high road, open heath, common, or down, by day or night, with faces blacked or otherwise *disguised*, or, being so disguised, to hunt, wound, kill, or steal any deer, to rob a warren, or to steal fish, or to procure by gift or promise of reward any person to join them in such unlawful act, is felony without benefit of clergy. I mention these offences in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed: namely, with the face blacked or with other disguise, and, being armed with offensive weapons, to the breach of the public peace and the terror of his majesty's subjects.

3. sending threatening letters, formerly high treason, now a felony ;

3. Also by the same statute, 9 Geo. I. c. 22, amended by statute 27 Geo. II. c. 15, knowingly to send any *letter* without a name, or with a fictitious name, *demanding* money, venison, or any other valuable thing, or *threatening*, without any demand, to kill any of the king's subjects, or to fire their houses, outhouses, barns, or ricks, is made felony without benefit of clergy. This offence was formerly high treason by the statute 8 Hen. V. c. 6 (3).

(3) The 9 Geo. I. c. 22, and 27 Geo. II. c. 15, depriving parties committing these offences of benefit of clergy, were repealed by 4 Geo. IV. c. 54, § 3, which subjected the party to transportation or imprisonment at the discretion of the court; the latter Act, however, is repealed, (except as to sending letters threatening to kill or murder, or to burn, or destroy property, and as to accessories to such offences, and as to rescues, *vide* note (33), *ante* 136,) by 7 & 8 Geo. IV. c. 27. All the statutes relating to these offences are repealed and consolidated by 7 & 8 Geo. IV. c. 27, and c. 29; and by 7 & 8 Geo. IV. c. 29, § 26, stealing, or attempting to kill or wound

any deer, kept in any enclosed ground, is declared felony, and the guilty party is liable to be punished as in the case of simple larceny; and committing the same offence in unenclosed grounds is punishable summarily by fine not exceeding 50*l.*, and repeating such offence is deemed felony, and punishable as a simple larceny.

By sect. 27, if any venison, or snares for the taking of deer, shall be found in the possession of any suspected person, who shall not satisfactorily account for it on being taken before a justice, he is liable on conviction to a penalty not exceeding 20*l.*; and, in case such person cannot be convicted, the justice may proceed, for the discovery of the

4. To pull down or destroy any *lock, sluice, or floodgate*, erected by authority of parliament on a navigable river, is by statute 1 Geo. II. st. 2, c. 19, made felony, punishable with transportation for seven years. By the statute 8 Geo. II. c. 20, the offence of destroying such works, or rescuing any person in custody for the same, is made felony without benefit of clergy; and it may be inquired of and tried in any adjacent county, as if the fact had been therein committed. By the statute 4 Geo. III. c. 12, maliciously to damage or destroy any banks, sluices, or other works on such navigable

4. destroying
turnpikes, &c.
a felony;

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party who actually killed the deer, and to summon any person through whose hands the same shall have passed, and the party from whom it shall have been first received, not giving a satisfactory account how he obtained it, shall be liable to the above penalty.

By sect. 28, setting engines for destroying deer, or pulling down any fence where the same are kept, subjects the offending party to a penalty not exceeding 20*l*.

By sect. 29, deer keepers are authorized to seize the guns, &c. of the offenders, who do not on demand deliver up the same; and, if any resistance is shewn to the keepers, the offenders are guilty of felony, and are liable to be punished as for simple larceny.

By sect. 30, the taking or killing any hares or conies, in any warren or breeding ground, used for that purpose, whether enclosed or not, in the night time, is punishable as a misdemeanor; and the destroying them, or using any snare for taking them, in the day time, subjects the offender to a penalty not exceeding 5*l*. Proviso not to affect persons killing conies on the sea or river banks in the county of Lincoln.

By sect. 34, taking fish in any water adjoining or belonging to the dwelling-house of any person, as the owner, is punishable as a misdemeanor; and committing the offence in any private fishery elsewhere, renders the offender liable to a penalty not exceeding 5*l*., besides the value of the fish taken.

This does not extend to anglers in the day time, but persons angling in the day time in such first-mentioned water, are liable to a penalty not exceeding 5*l*.; and, in such water as last-mentioned, to a fine not exceeding 2*l*.; and, in case of doubt respecting the boundaries of parishes wherein the offence is committed, it is sufficient to prove it to have taken place in the one set forth in the indictment, or in the one adjoining.

By sect. 35, the owner of the ground, water, or fishery, or his delegate, may seize the tackle of any trespasser, and, in such case, or on the offender quietly relinquishing the same, he absolves himself from all penalties.

By sect. 36, any person stealing oysters or oyster brood from any oyster bed, is guilty of larceny, and shall be punished accordingly; and any person unlawfully dredging in any oyster fishery, for the purpose of taking oysters or oyster brood, is guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, as the court shall award. Proviso, not to prevent persons from fishing for floating fish in any oyster fishery.

By sect. 63, justices have a power to grant a search warrant against any person, on the oath of any credible witness as to a reasonable ground of suspicion, that he has in his possession any property, the taking of which is punishable by this Act.

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river, to open the floodgates, or otherwise obstruct the navigation, is again made felony, punishable with transportation for seven years. And by the statute 7 Geo. III. c. 40, *which repeals all former acts relating to turnpikes, maliciously to pull down or otherwise to destroy any *turnpike-gate*, or fence, toll-house, or weighing-engine thereunto belonging, erected by authority of parliament, or to rescue any person in custody for the same, is made felony without benefit of clergy; and the indictment may be inquired of and tried in any adjacent county (4). The remaining offences against the public peace are merely misdemeanors, and no felonies; as,

5. affrays;
two may com-
mit an affray;
this a misde-
meanor; must
be done in pub-
lic;

5. Affrays, from *affraier*, to terrify, are the fighting of two or more persons in some public place, to the terror of his majesty's subjects (5): for, if the fighting be in private, it is no *affray* but an *assault* (b). Affrays may be suppressed by

(b) 1 Hawk. P. C. 134.

(4) By 7 & 8 Geo. IV. c. 30, amending and consolidating all former statutes on these subjects, breaking or cutting down any sea bank or wall, or the bank or wall of any river, canal, or marsh, or destroying any lock, sluice, floodgate, or other work, on any navigable river or canal, is made felony, punishable with transportation for life, or not less than seven years, or with imprisonment for any term not exceeding four years, and to male offenders with one, two, or three public whippings. And cutting off, or removing, the piles for securing any sea bank or wall, or the bank or wall of any river, canal, or marsh, or doing any injury to obstruct the navigation thereof, is made felony, subject to transportation for seven years, or to imprisonment for any term not exceeding two years, and to males, one, two, or three public whippings; § 12.

And by sect. 14, throwing down, or otherwise destroying any turnpike-gate, or other erection, or fence, connected with, or belonging to the same, is made punishable as a misdemeanor.

(5) Prize fights, or pugilistic combats for sums of money, come under this head of offence, and every individual present at and aiding and assisting in such a transaction, is guilty of a misdemeanor.

Persons who are present at a prize fight, and who have gone thither for the purpose of seeing the combatants strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants, and it is not at all material which of the combatants strikes the first blow; *Rex v. Perkins*, 4 C. & P. 537.

All persons present countenancing a prize fight, are guilty of an offence; *Rex v. Bellingham*, 2 C. & P. 234. And where a prize fight is expected, the magistrates ought to cause the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions, and if they refuse to enter into such securities, to commit them.

any private person present, who is justifiable in endeavouring to part the combatants, whatever consequences may ensue (c). But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace (d). The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case; for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel: this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued (e) (6). Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office; or where a respect to the particular place ought to restrain and regulate men's behaviour, more than in common ones; as in the king's court, and the like. And upon the same account also all affrays in a church or churchyard are esteemed very *heinous offences, as being indignities to him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5 and 6 Edw. VI. c. 4, that if any person shall, by words only, quarrel, chide, or brawl, in a church or churchyard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ*; and, if a clerk in orders, from the minis-

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(c) 1 Hawk. P. C. 136.

(e) Ibid. 138.

(d) Ibid. 137.

(6) If one kill another in a deliberate duel, under provocation of charges against his character and conduct however grievous, it is murder in him and his second; and, therefore, the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue

thereon against the peace; *Rex v. Rice*, 3 East, 581. See also *Rex v. Kirwan*, 2 B. & A. 462, *post*, 199.

An endeavour to provoke another to commit the misdemeanor of sending a challenge to fight a duel, is itself an indictable misdemeanor; *Rex v. Phillips*, 6 East, 464; 2 Smith, 550.

tration of his office during pleasure. And, if any person in such church or churchyard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto*; or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall besides excommunication, being convicted by a jury, have one of his ears cut off; or, having no ears, be branded with the letter F. in his cheek (7). Two persons may be guilty of an affray: but,

6. riots, routs, and unlawful assemblies; if done by three, misdemeanors; if by twelve, felonies;

6. Riots, *routs*, and *unlawful assemblies*, must have *three* persons at least to constitute them. An *unlawful assembly* is when three, or more, do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it (*f*) (8). A *rout* is where three

(*f*) 3 Inst. 176.

(7) By 9 Geo. IV. c. 31, § 1, "so much of 5 & 6 Edw. VI. c. 4, entitled, "An Act against Quarrelling and Fighting in Churches and Churchyards, as relates to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike, as therein mentioned," is repealed.

It seems that brawling was not made an offence by 5 & 6 Edw. VI. c. 4, but was previously cognizable by the spiritual courts; *ex-parte Williams*, 6 D. & R. 373; 4 B. & C. 313.

With respect to the malicious or contemptuous disturbance of a congregation, or molestation of a minister, during the celebration of Divine service, see the statutes 1 M. c. 3, and 1 W. & M. c. 18, *ante*, 54. The following decision, as illustrative of the construction to be put upon those statutes, seems not unimportant. To an action of assault and false imprisonment, a constable pleaded, that the plaintiff illegally, intentionally, and irreverently made a disturbance in church, whereby the performance of Divine service was interrupted and disturbed; whereupon defendant gently laid hands on him, took him out of church, and detained

him in custody until the service was over. It appeared in evidence that the alleged disturbance was in the plaintiff (an unauthorized person) having read aloud in church, between the communion service and the sermon, a notice of a vestry meeting: held, that the plea was no answer to the action; for, though the constable might turn the plaintiff out of church, yet he had no right to detain him in custody; *Williams v. Glenister*, 4 D. & R. 217; 2 B. & C. 699.

Disturbing a minister, while reading the present Common Prayer, is within the 1 M. c. 3; 1 Russell, 280: and see *Rex v. Cheere*, 7 D. & R. 461. In an indictment under 1 W. & M. c. 18, for disturbing a dissenting congregation, it is not necessary to prove that the minister has taken the oaths prescribed by that Act. Such an indictment may, it seems, be removed by certiorari, before verdict; 5 T. R. 542. See 52 Geo. III. c. 155, § 12; *ante*, 54, n. (6).

(8) The assembling must be with circumstances of terror, and with intent to do some unlawful act; 1 Hawk. 514, § 3, &c. If several meet together at a fair or wake, and a quarrel ensue,

or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way; and make some advances towards it (*g*). A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel (*h*); as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. The punishment of unlawful assemblies, if to the number of twelve, we have just now seen, may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only (*9*). The same is the case in riots and routs by the common law; to *which the pillory in very enormous cases has been sometimes superadded (*i*). And by the statute 13 Hen. IV. c. 7, any two justices, together with the sheriff or undersheriff of the county, may come with the *posse comitatus*, if need be,

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(*g*) Bro. Abr. t. Riot, 4, 5.

(*i*) 1 Hawk. P. C. 159.

(*h*) 3 Inst. 176.

they will be guilty of an affray; but, if they form parties under pledge of mutual assistance, and engage in any tumultuous proceedings, it will amount to a riot; *id*.

(9) By 3 Geo. IV. c. 114, hard labour may be added. Persons present, aiding and abetting, are principals in the second degree, and are within the Riot Act; *Rex v. Royce*, 4 Bur. 2073; *Rex v. Hunt*, 1 Ld. Ken. 198. A rising to quell a treasonable riot is lawful; *Rex v. Wigan*, 1 W. Bl. 47.

An assembly of great numbers of persons, which, from its general appearance and accompanying circumstances, is calculated to excite terror and alarm, is generally criminal and unlawful; *Rex v. Hunt*, 1 Russ. 254. And all persons who join such an assembly, disregarding its probable effect, and all who give countenance and support to it, are criminal parties; *id*.

A meeting called "to adopt preliminary measures for holding a national

convention," is an illegal meeting, and a party who attends it, knowing it to be so, is guilty of an offence, whether the proclamation from the Riot Act has been read or not; *Rex v. Furney*, 6 C. & P. 81.

If four are indicted for a riot, and two die before trial, and two are found guilty, judgment will not be arrested; *Rex v. Scott*, 3 Burr. 1262; 1 W. Bl. 359.

If persons be charged with a riot and cutting down fences, and the indictment do not conclude *in terrorem populi*, they cannot, upon that indictment, be convicted of a riot, but may be convicted of unlawfully assembling; *Rex v. Coe*, 4 C. & P. 538.

If persons assemble together for a purpose which, if executed, would make them rioters, but do nothing, and separate without carrying their purpose into effect, this is an unlawful assembly; *Rex v. Birt*, 5 C. & P. 154.

and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable (*j*) (10). So that our ancient law, previous to the modern Riot Act, seems pretty well to have guarded against any violent breach of the public peace: especially as any riotous assembly on a public or general account, as to redress grievances or pull down all enclosures, and also resisting the king's forces if sent to keep the peace, may amount to overt acts of high treason, by levying war against the king.

7. tumultuous petitioning, a misdemeanor, punishable by fine and imprisonment,

7. Nearly related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by statute 13 Car. II. st. 1, c. 5, it is enacted, that not more than twenty names shall be signed to any petition to the king or either house of parliament, for any alteration of matters established by law in church or state; unless the

(*j*) 1 Hal. P. C. 495; 1 Hawk. P. C. 161.

(10) A magistrate may call in all the king's subjects to quell a riot, not excepting the soldiers, who are subjects, and may act as such; though this should be done with great caution. And, during a riot, a magistrate may repel force by force before the reading of the proclamation from the Riot Act; *Rex v. Kennett*, 5 C. & P. 282 n.

The general rules of law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them; and all the king's subjects are bound to do so, upon reasonable warning. In point of law, a ma-

gistrate would be justified in giving fire arms to those who come to assist him, but it would be imprudent in him to do so; *Rex v. Pinney*, 5 C. & P. 254, at bar, in K. B.

If, on a riot taking place, a magistrate neither reads the proclamation from the Riot Act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him; *Rex v. Kennett*, 5 C. & P. 282, n.

And see other points bearing upon the same subject, decided in *Rex v. Pinney*, 3 Barn. & Adol. 946.

contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter-sessions; and, in London, by the lord mayor, aldermen, and common council (*k*): and that no petition shall be delivered by a company of more than ten persons; on pain *in either case of incurring a penalty not exceeding 100*l*. and three months' imprisonment. [*148]

8. An eighth offence against the public peace is that of a *forcible entry* or *detainer*; which is committed by violently taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person disseised, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other circumstances; which were explained more at large in a former volume (*l*). But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim (*m*). So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. By the statute 5 Ric. II. st. 1, c. 8, all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Ric. II. c. 2; 8 Hen. VI. c. 9; 31 Eliz. c. 11, and 21 Jac. I. c. 15, upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots; and upon such conviction may commit the offender to gaol, till he makes fine and ransom to the king (11). And

(*k*) This may be one reason, among others, why the corporation of London has, since the Restoration, usually taken the lead in petitions to parlia-

ment for the alteration of any established law.

(*l*) See vol. III. p. 174, &c.

(*m*) 1 Hawk. P. C. 141.

(11) An indictment at common law, charging the defendant with having unlawfully, and with a strong hand, entered the prosecutor's mill and expelled him from the possession, is good, the

law allowing no person to assert his title with force and violence; *Rex v. Wilson*, 8 T. R. 357. But see 1 Hawk. P. C. 140; and Butler's note to Co. Litt. 257, a, from which it would seem,

moreover the justice or justices have power to summon a jury, to try the forcible entry or detainer complained of: and if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them: and the same may be done by indictment at the general sessions (12). But this provision does not ex-

that one disseised of lands, who could not regain possession by fair means, might lawfully use force, unless he was driven to an action by neglecting to enter in due time; and that, in such case, an indictment would not lie against him at common law for a forcible entry. Where, however, the party has *no title*, he is clearly indictable at common law; *Rex v. Bake*, 3 Burr. 1731; and, in such an indictment, no technical words are necessary, it is enough to shew a public breach of the peace; and, as the prosecutor is not entitled at common law, as he is by the statutes, to restitution and damages, he need not be stated to be *seised* of the premises; *Rex v. Wilson*, *supra*.

In an indictment for a forcible entry upon the possession of a lessee for years, proof of the force and of such possession is sufficient, although the indictment also alleges that the premises were his freehold, and that allegation is not proved; *Rex v. Lloyd*, Cald. 415.

In an indictment for a forcible entry which does not shew sufficient actual force, violence, unlawfully assembling, riot, or other circumstances, will be quashed even on motion; *Rex v. Bake*, 3 Burr. 1731.

An averment in an indictment for a forcible entry that the prosecutor was "seised," is sufficient to found an application for a writ of restitution; and it need not be shewn by the prosecutor that he still continued to be seised; *Rex v. Dillon*, 2 Chit. R. 314.

An indictment will lie for a forcible entry in a close; *Rex v. Nicholls*, 2 Ld. Ken. 512.

To constitute a forcible entry, or detainer, it is not necessary that any one should be assaulted, but only that the entry or detainer should be with such numbers of persons, and shew of force, as are calculated to deter the rightful owner from sending the persons away, and resuming his own possession; *Milner v. Maclean*, 2 C. & P. 17. And see *Rex v. Smyth*, 5 C. & P. 201.

If a tenant of a house, after a regular notice to quit, abandons it and locks it up, leaving furniture in it, and the landlord breaks it open and takes possession, the tenant cannot maintain trespass: his remedy, if any, is by indictment for forcible entry; *Turner v. Meymott*, 7 Moore, 574; 1 Bing. 158.

A conviction for a forcible detainer under 6 Hen. VI. c. 9, must shew an unlawful entry as well as a forcible detainer; *Rex v. Oakley*, 4 Barn. & Adol. 307; 1 Nev. & Man. 58.

And see further as to the form of indictments under the statutes for these offences, Style, 136; Yelv. 165; Sayer, 142, 3; Leon. 102; Palmer, 277; 1 Sid. 102; Vent. 89, 306; 1 Hawk. P. C. 148; 2 Rol. Abr. 80; Archb. Cr. Pl. 338; 2 Stark. C. P. 446; 1 Russ. 290.

(12) Restitution is to be awarded of the possession of visible and corporeal tenements only, and to him only who has been put out of the actual possession; 1 Russell, 192.

The statute 8 Hen. VI. c. 9, § 6, which gives treble damages to the party grieved by a forcible entry and expulsion, applies only to persons having the *freehold*; for the remedy is

tend to such as endeavour to maintain possession by force, where they *themselves, or the ancestors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding (n) (13). [*149]

9. The offence of *riding* or *going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3, upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour (o). 9. going unusually armed;

10. Spreading *false news*, to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law (p) with fine and imprisonment; which is confirmed by statutes Westm. 1; 3 Edw. I. c. 34; 2 Ric. II. st. 1, c. 5; and 12 Ric. II. c. 11. 10. spreading false news;

11. False and *pretended prophecies*, with intent to disturb the peace, are equally unlawful, and more penal; as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They are, therefore, punished by our law, upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the ancient Gauls (q). Such false and pretended prophecies were punished capitally by statute 11. pretended prophecies, formerly capital;

(n) Holding over by force, where the tenant's title was under a lease, now expired, is said to be a forcible detainer. (Cro. Jac. 199.)

(o) Pott. Antiq. b. 1, c. 26.

(p) 2 Inst. 226; 3 Inst. 198.

(q) "*Habent legibus sanctum, si quis quid de republica a finitimis rumore aut fama acceperit, uti ad magistratum deferat, neve cum alio communicet: quod sæpe homines temerarios atque imperitos falsis rumoribus terreri, et ad*

facinus impelli, et de summis rebus consilium capere cognitum est." Cæs. de Bell.; Gall. lib. 6, cap. 19.—"They have a law, that if any one shall hear from his neighbours, by rumour or report, any thing concerning the state, he shall communicate it to a magistrate, and to no other person; for that rash and ignorant men, are often terrified and driven to commit crime, and to interfere in important matters, by false rumours."

given against the disseisor; *Cole v. Eagle*, 8 B. & C. 409.

(13) The three years' quiet possession which bars the award of restitution, must be a continuous possession for three years next before the prose-

cution; 1 Russell, 192. In cases of restitution, the party aggrieved is not a competent witness for the prosecution; *Rex v. Beavan*, 1 R. & M. 242; *Rex v. Williams*, 9 B. & C. 549; 4 M. & R. 471.

1 Edw. VI. c. 12, which was repealed in the reign of queen Mary. And now by the statute 5 Eliz. c. 15, the penalty for the first offence is a fine of ten pounds and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment during life.

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12. challenges to fight, verbal and written ;

12. Besides actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence (*r*). If this challenge arises on account of any money won at gaming, or if any assault or affray happen upon such account, the offender, by statute 9 Ann. c. 14, shall forfeit all his goods to the crown, and suffer two years' imprisonment (14).

13. libels, which are equally punishable, whether true or false ;

13. Of a nature very similar to challenges are *libels*, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule (*s*) (15). The direct tendency of these

(*r*) 1 Hawk. P. C. 135, 138.

(*s*) 1 Hawk. P. C. 193.

(14) An endeavour to provoke another to commit the misdemeanor of sending a challenge to fight, is itself an indictable misdemeanor; *Rex v. Philipps*, 6 East, 464; 2 Smith, 550. By 9 Geo. IV. c. 31, § 1, "so much of 9 Ann. c. 14, as relates to the forfeiture and punishment of any person assaulting and beating, or challenging or provoking to fight, any other person on account of any money won as therein mentioned," is repealed. As to assaults, generally, see *post*, 216, 217; 9 Geo. IV. c. 31, § 24 to 27.

(15) See 1 Hawk. P. C. 193; 5 Co. Rep. 125; 1 Salk. 418; 1 Ld. Raym. 416; 4 T. R. 126. On an information for falsely and maliciously

publishing a libel of and concerning the king, by giving it out that his majesty was afflicted with mental derangement, a verdict of guilty having passed against the defendants, it was resolved, 1st. That to assert falsely of his majesty, or of any individual, that he labours under the affliction of mental derangement, is a criminal act, and a malicious intention may be inferred from the mere fact of publication, unless evidence is given by the defendant to rebut such inference; 2d. That such an assertion concerning the king, being in itself mischievous to the public, is an indictable offence, without any allegation or direct proof of a malicious intention; 3d. That where the

libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law (*t*) (16): and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace (*u*) (17). For the same reason it is immaterial with

(*t*) Moor, 813.

Hob. 215; Poph. 139; 1 Hawk. P. C.

(*u*) 2 Brownl. 151; 12 Rep. 35;

195.

jury desired to know, "Whether, in order to convict a defendant for the publication of a libel, a malicious intention must not have existed in his mind," they were correctly answered by the judge, who told them, that "a person who publishes that which is calumnious concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously calculated to effect, unless he can shew the contrary, and the onus of proving the contrary lies upon him; and 4th. That where the publisher of a libel states, that the fact which he communicates is "from authority," and it turns out that the fact is untrue, he is guilty of a false assertion in the criminal sense of the word; *Rex v. Harvey*, 3 D. & R. 464; 2 B. & C. 257. The court of King's Bench granted a criminal information against the publisher of a newspaper, for a libel reflecting upon the clergy of a particular diocese, and upon the clergy of the church of England generally, though no individual prosecutor was named, and though the libellous matter was not negatived on affidavit; *Rex v. Williams*, 1 D. & R. 197; 5 B. & A. 593. Lord Ellenborough, in the *King v. Cobbett*, expressed himself in these words, (as to exposing persons by signs or pictures,) "No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals, or of society, be interrupted, or even exposed,

by types and figures, the act, by the law of England, is a libel;" E. T. K. B. 1804.

The court of Common Pleas have decided, "That a justice of the peace has authority to grant a warrant to arrest a person charged with the publication of a libel, and upon the person neglecting to find sureties, may commit him to prison, there to continue till delivered by due course of law; *Butt v. Conant*, 4 Moore, 195; 1 B. & B. 548.

The court of King's Bench in a recent case have held, that the editor of a newspaper is not by law entitled to publish *ex parte* statements of a defamatory nature against an individual, although the publication may be a fair account of proceedings before a police magistrate; a police-office not being as matter of right an open court. Quære, whether such a publication would be justifiable, even when the proceedings took place in an open court? *Duncan v. Thwaites*, 5 D. & R. 447; 3 B. & C. 556. In support of the decision there laid down, that a police-office, or a magistrate's room, is not an open court, see *Cox v. Coleridge*, 2 D. & R. 86; 1 B. & C. 37.

(16) Delivering a libel, sealed, in one county, for the purpose of its being opened and published by a third person in another county, is a publication; *Rex v. Burdett*, 4 B. & A. 95.

(17) But such a publication will not support an action; Hob. 215; 2 Esp. 625; Sel. N. P. 939. See 38 Geo. III. c. 78; see, also, *Holt, George*, and

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respect to the essence of a libel, whether the matter of it be true or false (*v*); since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate its guilt, and enhance its punishment (18). In a civil action, we may remember, a libel must appear to be false, as well as scandalous (*w*): for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever *offence it may be against the public peace: and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers. And therefore, in such prosecutions, the only points to be inquired into are, first, the making or publishing of the book or writing; and, secondly, whether the matter

(*v*) Moor, 627; 5 Rep. 125;
11 Mod. 99.

(*w*) See vol. III. p. 125.

Mence, on Libel, 1 Russell, 3 Burn, and the other text writers, with the authorities by them collected, on this subject. It had been intended to have glanced here at the leading decisions upon this intricate branch of our criminal law, but they are so very numerous, and have given rise to so many nice and subtle distinctions, that it has been found quite impossible to embody them within the proper limits of a note, with any chance of rendering it useful or even intelligible to the student. For the rules of evidence applicable to libels, see *Starkie*, *Phillips*, and *Roscoe*, on evidence. The following decision upon this subject seems worthy of mention: The defendant had been convicted of publishing a libel, imputing perjury to the prosecutor. Upon his being brought up for judgment, it was proposed, in mitigation of punishment, to read his own affidavit, and those of several other persons, setting forth facts and circumstances, and containing statements which amounted to an asser-

tion of the truth of the original libel. But the court refused to receive such affidavits. They said the utmost latitude that ever had been, or ought to be allowed to a defendant in such cases, was to read his own affidavit, stating that, at the time when he published the libel, he had reasons for believing, and did believe, the contents of it to be true; that to go the length proposed, would be to allow the defendant to charge the prosecutor with perjury, and in effect to compel the court to try him for that offence upon affidavits; and that the adoption of such a course would place the prosecutor in a degree of peril and hardship, and would militate against the substantial principles of justice; *Rex v. Halpin*, 4 M. & R. 8; 9 B. & C. 65.

(18) The words of Lord Mansfield, "the greater truth, the greater libel;" which his enemies wished with much eagerness to convert to the prejudice of that noble peer's reputation as a judge, were founded in principle and supported by very ancient authority.

be criminal: and, if both these points are against the defendant, the offence against the public is complete. The punishment of such libellers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in its discretion shall inflict; regarding the quantity of the offence, and the quality of the offender (x) (19). By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Augustus, the

(x) 1 Hawk. P. C. 196.

Lord Coke has said, "that the greater appearance there is of truth in any malicious invective, so much the more provoking it is;" 5 Co. 125.

Where truth is a greater provocation than falsehood, and therefore has a greater tendency to produce a breach of the public peace, then it is certainly true that the greater truth, the greater libel. *Asperis facetiis inclusus, quæ ubi multum ex vero traxere, acrem sui memoriam relinquunt*; TAC. Ann. 15, c. 68. —CH.

(19) Though it has been held, at least for these two centuries, that the truth of a libel is no justification in a criminal prosecution, yet in many instances it is considered an extenuation of the offence; and the court of King's Bench has laid down this general rule, viz. that it will not grant an information for a libel, unless the prosecutor, who applies for it, makes an affidavit, asserting, directly and pointedly, that he is innocent of the charge imputed to him. But this rule may be dispensed with, if the person libelled resides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in parliament; Doug. 271, 372.*

It had frequently been determined by the court of King's Bench, that the

only questions for the consideration of the jury, in criminal prosecutions for libels, were the fact of publication, and the truth of the innuendoes, that is, the truth of the meaning and sense of the passages of the libel, as stated and averred on the record, and that the judge or court alone were competent to determine whether the subject of the publication was or was not a libel. See the case of the *Dean of St. Asaph*, 3 T. R. 428. But the legality of this doctrine having been much controverted, the 32 Geo. III. c. 60, was passed, intituled *An Act to remove doubts respecting the functions of juries in cases of libels*. And it declares and enacts, that on every trial of an indictment or information for a libel, the jury may give a general verdict of guilty, or not guilty, upon the whole matter in issue, and shall not be required or directed by the judge to find the defendant guilty, merely on the proof of the publication of the paper charged to be a libel, and of the sense ascribed to it by the record. But the statute provides, that the judge may give his opinion to the jury respecting the matter in issue, and the jury may at their discretion, as in other cases, find a special verdict, and the defendant, if convicted, may move the court, as before the statute, in arrest of judgment.

* This rule has been held not to extend to the queen consort.

punishment became corporal only (*y*). Under the emperor Valentinian (*z*) it was again made capital, not only to write, but to publish, or even to omit destroying them. Our law, in this and many other respects, corresponds rather with

(*y*)

Quinetiam lex

Pœnaque lata, malo quæ nollet carmine quenquam

Describi :—vertere modum formidine fustis.

HOR. *ad Aug.* 152.

(*z*) *Cod.* 9, 36.

A person may be punished for a libel reflecting on the memory and character of the dead, but it must be alleged, and proved to the satisfaction of the jury, that the author intended by the publication to bring dishonour and contempt on the relations and descendants of the deceased; 4 T. R. 126.

It is not a libel to publish a correct copy of the reports or resolutions of the two houses of parliament, or a true account of the proceedings of a court of justice. "For though," as Mr. Justice Lawrence has well observed, "the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons, whose conduct may be the subject of such proceedings;" *Rex v. Wright*, 8 T. R. 293.

But this will not apply to the publication of part of a trial, before it is finally concluded; for that might enable the friends of the parties to pervert the justice of the court by the fabrication of evidence, and other impure practices.

Nor ought it to extend to the publication of trials, where indecent evidence must from necessity be introduced; for it would be in vain to turn women and children out of court, if they are afterwards permitted to read what has passed in their absence.

Lord Hardwicke has declared that any publication, which shall prejudice

the world with regard to the merits of a cause before it is heard, is a contempt of the court, in which the cause is pending; and he committed, upon a summary motion only, the parties who had been guilty of such a publication; 2 Atk. 472.

The reason must be much stronger for suppressing partial and premature publications upon subjects, which may be tried by a jury.

The sale of the libel by a servant in a shop, is *primâ facie* evidence of publication in a prosecution against the master, and is sufficient for conviction, unless contradicted by contrary evidence, shewing that he was not privy, nor in any degree assenting to it; *Ibid.* & 5 Burr. 2686. When a person is brought up to receive judgment for a libel, his conduct, subsequent to his conviction, may be taken into consideration, either by way of aggravation or mitigation of the punishment; 3 T. R. 432. And when Johnson the bookseller was brought up for judgment for having published a seditious libel, the attorney-general produced an affidavit that the defendant after his conviction had published the same libel in the *Analytical Review*; M. T. 1798.

An information or an indictment need not state that the libel is false, or that the offence was committed by force and arms; 7 T. R. 4.

Hanging up, or burning, an effigy with intent to expose some particular person to ridicule and contempt, is an offence of the same nature as a libel, and has frequently been punished with great but proper severity.—CH.

the middle age of Roman jurisprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were established in the dark and tyrannical ages of the ancient *decemviri*, or the later emperors.

In this, and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity: the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and *not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution (*a*), is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish, as the law does at present, any dangerous or offensive writings,

the liberty of the press not infringed by the law of libel;

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(*a*) The art of printing, soon after its introduction, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of Star-chamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications, unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I. after their rupture with that prince, assumed the same powers as the Star-chamber exercised with respect to the licensing of books; and in 1643, 1647, 1649, and 1652, (Scobell, i. 44, 134, ii. 88, 230,)

issued their ordinances for that purpose, founded principally on the Star-chamber decree of 1637. In 1662 was passed the statute 13 and 14 Car. II. c. 33, which, with some few alterations, was copied from the parliamentary ordinances. This Act expired in 1679, but was revived by statute 1. Jac. II. c. 17, and continued till 1692. It was then continued for two years longer by statute 4 W. and M. c. 24; but though frequent attempts were made by the government to revive it, in the subsequent part of that reign (Com. Journ. 11 Feb. 1694, 26 Nov. 1695, 22 Oct. 1696, 9 Feb. 1697, 31 Jan. 1698,) yet the parliament resisted it so strongly that it finally expired, and the press became properly free, in 1694; and has ever since so continued.

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which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man, says a *fine writer on this subject, may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for restraining the just freedom of the press, "that it was necessary to prevent the daily abuse of it," will entirely lose its force, when it is shewn, by a seasonable exertion of the laws, that the press cannot be abused to any bad purpose, without incurring a suitable punishment: whereas it never can be used to any good one, when under the control of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty, of the press (20).

(20) To this chapter it will be proper to annex the substance of an important act of parliament passed to secure the public peace, viz. the 39th Geo. III. c. 79, the preamble of which states: "Whereas a traitorous conspiracy has long been carried on, in conjunction with the persons from time to time exercising the powers of government in France, to overturn the laws, constitution, and government, and every existing establishment, civil and ecclesiastical, both in Great Britain and Ireland, and to dissolve the connexion between the two kingdoms, so necessary to the security and prosperity of both: And whereas, in pursuance of such design, and in order to carry the same into effect, divers societies have been of late years instituted in this kingdom, and in the kingdom of Ireland, of a new and dangerous nature, inconsistent with public tranquillity and with the existence of regular government, particu-

larly certain societies calling themselves Societies of United Englishmen, United Scotchmen, United Britons, United Irishmen, and the London Corresponding Society: And whereas the members of many of such societies have taken unlawful oaths and engagements of fidelity and secrecy, and used secret signs, and appointed committees, secretaries, and other officers, in a secret manner; and many of such societies are composed of different divisions, branches, or parts, which communicate with each other by secretaries, delegates, or otherwise; and by means thereof maintain an influence over large bodies of men, and delude many ignorant and unwary persons into the commission of acts highly criminal;" it therefore enacts, that all these and other corresponding societies should be utterly suppressed and prohibited, as being unlawful combinations and confederacies.

And also every society of which the members shall, according to the rules of the society, be required to take an illegal oath, or an oath not authorized by law, or shall subscribe or assent to any test or declaration not required by law, or where the names of the members, or where the committees or presidents chosen, are not known to the society at large; and all societies which shall consist of different parts, either acting separately or having separate presidents or other officers, shall be deemed unlawful combinations and confederacies; and every person who shall become a member of such a society, or who shall correspond with them, or shall aid or support them with money or otherwise, shall be guilty of an unlawful combination and confederacy.

This does not extend to a declaration subscribed to by a society, which declaration shall be approved by two justices and afterwards confirmed at the quarter sessions, nor to persons who shall cease to act as members of such societies after the passing of the Act, nor to established lodges of freemasons. But two members shall certify, and upon oath, that their society has been usually held as a lodge of freemasons, in conformity to the rules of freemasons in this kingdom; which certificate, and also an account of its place and times of meeting, and the names of all its members, shall be registered with the clerk of the peace; and the justices at the sessions, upon complaint made to them upon oath by any credible person that such society is likely to be injurious to the public peace and good order, may direct that the meetings of such lodge be discontinued.

Persons offending against this statute may be proceeded against either in a summary way before one justice, or more, who may either fine the offender 20*l.* or imprison him three calendar months, or they may be prosecuted by indictment, and upon conviction the court may transport for seven years, or

imprison for any time, not exceeding two years.

The justices in a summary conviction may mitigate the punishment to one-third. If any person shall permit the meeting of any illegal society in his house, he shall forfeit 5*l.* for the first offence, and for the second he shall be punishable as a member. And two justices, upon evidence on oath that any meeting has been held for a seditious purpose in a public-house, may declare the licence forfeited, and from the day of such declaration the licence is void and determined, and the owner of the house will be afterwards subject to penalties accordingly.

And because many places were open for lectures and debates of a seditious and immoral nature, and other places used for seditious and immoral purposes under pretence of reading books, pamphlets, newspapers, or other publications, it is enacted, that all such places where, under any pretence, money shall be received for admission, shall be considered as disorderly houses, under the 36 Geo. III. c. 8, (see *ante*, p. 88, n. 15,) unless they are licensed for any time not more than one year by two justices; which licence may be revoked by the justices at the quarter sessions. Every ale-house shall be deemed licensed for reading publications; but upon evidence that publications of a seditious or immoral nature are usually distributed in order to be read there, two justices may declare the licence void.

The Act then states that these societies had published in great quantities, papers of an irreligious, treasonable, and seditious nature, and had dispersed them among the lower classes of the community, either gratis or at very low prices, and with an activity and profusion beyond all former example, and that it was highly important to the public peace that it should in future be known by whom any such papers shall be printed; it therefore enacts, that every person having any printing-press, or types for printing,

and every person carrying on the business of a letter-founder, or maker or seller of types for printing, or of printing-presses, shall give notice thereof to the clerk of the peace, who shall transmit a copy to one of his Majesty's principal secretaries of state: persons omitting to give the notice required shall forfeit 20*l*.

And every person who shall sell types or printing-presses shall keep an account of all persons to whom they shall be sold, and shall produce such an account at any time to any justice of the peace requiring the same, on a penalty of 20*l*.

The printer shall print upon the front of every paper, which is printed on one side only, and upon the first and last leaves of every publication which contains more than one leaf, his name and place of abode; and in case of omission shall forfeit for every copy published 20*l*.;* and every person who prints for profit shall keep one copy of every paper so printed, on which shall be written or printed the name and

place of abode of the person by whom such printer shall be employed, and shall produce the same to any justice of the peace who within the space of six months shall require to see the same, and upon neglect or refusal, shall forfeit 20*l*.

Any person may apprehend those who are publishing papers without the name and abode of the printer, and may convey them, or deliver them to a constable to convey, to a magistrate to be examined; and a peace officer, by a warrant from a justice of the peace, may enter any house or room to search for any printing-press or types suspected to be kept or used without the notice required by the Act, and to seize and carry them away, together with all printed papers found in such house or room.

By the 38 Geo. III. c. 78, the editors of newspapers are put under various regulations, by which they may be more easily brought to punishment for any seditious or mischievous publication.—CH †

* This has been altered by 51 Geo. III. c. 65, § 1, which enacts, that nothing in the 27th section of the 39 Geo. III. c. 79, shall extend to make any person or persons offending against the same, liable to more than twenty-five forfeitures or penalties for printing, or publishing, or dispersing, or assisting in publishing or dispersing, any number of copies of one and the same paper, or book, contrary to the said section of the said act.

The stat. 51 Geo. III. c. 65, § 2, also enacts, that if any justice or other magistrate before whom any person shall be convicted of any offences against the provisions of the 39th Geo. III. c. 79, shall see cause to mitigate such penalty or penalties, it shall be lawful for such justice or other

magistrate to mitigate or lessen the same to any sum not less than five pounds over and above all reasonable costs and charges expended or incurred in the prosecution.

† Vide ante 87, note (15), 148, note (9). An act of parliament for the suppression of a highly dangerous and unconstitutional society, which had for some time existed in Ireland, called the Catholic Association, received the royal assent early in the year 1829. That was the 10 Geo. IV. c. 1, intitled "An Act for the Suppression of Dangerous Associations or Assemblies in Ireland," which it was deemed advisable to pass as a preliminary to passing the Catholic Relief Bill, 10 Geo. IV. c. 7.

CHAPTER XII.

OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES against public *trade*, like those of the preceding classes, are either felonious, or not felonious. Of the first sort are,

Offences against public trade, are felonious, and not felonious.

1. Owling, so called from its being usually carried on in the night, which is the offence of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law (*a*), and more particularly by statute 11 Edw. III. c. 1, when the importance of our woollen manufacture was first attended to; and there are now many later statutes relating to this offence, the most useful and principal of which are those enacted in the reign of queen Elizabeth, and since. The statute 8 Eliz. c. 3, makes the transportation of live sheep, or embarking them on board any ship, for the first offence forfeiture of goods, and imprisonment for a year, and that at the end of the year the left hand shall be cut off in some public market, and shall be there nailed up in the openest place; and the second offence is felony. The statutes 12 Car. II. c. 32, and 7 and 8 W. III. c. 28, make the exportation of wool, sheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by the owners, if privy: and confiscation of goods, and three year's imprisonment to the master and all the mariners. And the statute 4 Geo. I. c. 11, amended and further enforced by 12 Geo. *II. c. 21, and 19 Geo. II. c. 34, makes it transportation for seven years, if the penalties be not paid (1).

1. Owling, felonious;

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(*a*) Mir. c. 1, § 3.

(1) By 5 Geo. IV. c. 47, § 2, all acts and parts of acts prohibiting the exportation of wool are repealed, and persons are now at full liberty to export this commodity, upon paying a

certain duty.

By 57 Geo. III. c. 88, fuller's earth, fulling clay, and tobacco-pipe clay, may be carried coastwise, under certain restrictions contained in 32

2. Smuggling,
felonious; under
some circum-
stances capital;

2. Smuggling, or the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise, is an offence generally connected and carried on hand in hand with the former. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices: but the last of them, 19 Geo. II. c. 34, is for this purpose *instar omnium*; for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy: enacting, that if three or more persons shall assemble, with fire arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offences; or shall pass with such goods in disguise; or shall wound, shoot at, or assault, any officers of the revenue when in the execution of their duty; such persons shall be felons without the benefit of clergy (2). As to that branch of the statute, which required

Geo. III. c. 50, upon goods prohibited to be exported.

By 4 Geo. IV. c. 69, § 24, all prohibitions against the exportation of tobacco-pipe clay are removed, and the same is thereby declared free.

(2) The statute now in force upon this subject is the 3 & 4 W. 4, c. 53, by sect. 1, of which all prior existing statutes relating to the same subject are consolidated into one act.

By sect. 8, in case any vessel or boat liable to seizure or examination under any act or law for the prevention of smuggling, shall not bring to on being required so to do, on being chased by any vessel or boat in his Majesty's navy, having the proper pendant and ensign of his majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person having the charge or command of such vessel or

boat in his Majesty's navy, or employed as aforesaid, (first causing a gun to be fired as a signal), to fire at or into such vessel or boat; and such captain, master, or other person acting in his aid or assistance, or by his direction, shall be and he is hereby indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing.

It has been held, with reference to a similar enactment in a former statute, 56 Geo. III. st. 2, c. 104, § 8, that if a Custom-house vessel chase a smuggler, and fire into her, without hoisting such a pendant and ensign as the law requires, the returning the fire is not malicious; *Rex v. Reynolds*, R. & R. C. C. 465.

By sect. 53, no person shall, after sunset and before sunrise, between 21st September and 1st April, or after the hour of eight in the evening, and before the hour of six in the morning, at any other time in the year, make, or

any person, charged upon oath as a smuggler, under pain of death, to surrender himself upon proclamation, it seems to be

aid or assist in making, any signal in or on board or from any vessel or boat, or on or from any part of the coast or shore of the united kingdom, or within six miles of any part of such coasts or shores, for the purpose of giving any notice to any person on board any smuggling vessel or boat, whether any person so on board of such vessel or boat be or be not within distance to notice any such signal; and if any person, contrary to the true intent and meaning of this act, make or cause to be made, or aid or assist in making, any such signal, such person so offending shall be guilty of a misdemeanor; and it shall be lawful for any person to stop, arrest, and detain the person or persons who shall so offend, and to carry and convey such person or persons so offending before any one or more of his Majesty's justices of the peace residing near the place where such offence shall be committed, who, if he sees cause, shall commit the offender to the next county gaol, there to remain until the next court of oyer and terminer, great session, or gaol delivery, or until such person or persons shall be delivered by due course of law; and it shall not be necessary to prove on any indictment or information that any vessel or boat was actually on the coast; and the offender or offenders, being duly convicted thereof, shall, by order of the court, before whom such offender or offenders shall be convicted, either forfeit and pay the penalty or forfeiture of 100*l.*, or, at the discretion of such court, be sentenced or committed to the common gaol or house of correction, there to be kept to hard labour, for any term not exceeding one year.

By sect. 54, in case any person be charged with or indicted for having made or caused to be made, or been aiding or assisting in making, any such

signal as aforesaid, the burthen of proof that such signal so charged as having been made with intent, and for the purpose of giving such notice as aforesaid, was not made with such intent, and for such purpose, shall be upon the defendant against whom such charge is made or such indictment is found.

By sect. 55, it shall be lawful for any person whatsoever to prevent any signal being made as aforesaid, and to enter and go into and upon any lands for that purpose, without being liable or subject to any indictment, suit, or action for the same.

An indictment for this offence charged it to have been committed on the 9th March, but did not state it to have been committed between the 21st September and the 1st April; but the day was proved as laid, and the objection was held no ground for arresting the judgment; *Rex v. Brown, M. & M. N. P. C. 163.*

All that it is necessary to prove in support of an indictment for this offence is, that the defendant made a signal by lighting a fire or otherwise, or was present aiding or assisting in so doing on the sea-shore, &c. as stated in the indictment. It need not be proved that any smuggling vessel was in fact within sight, or actually on the coast, at the time; and it is for the defendant to prove, if he can, that the fire, &c. was not lighted with the intent charged in the indictment; *Archb. Cr. Pl. 468, 469.* The quarter sessions have cognizance of this offence; *Rex v. Cock, 4 M. & S. 71.*

By sect. 58, if any persons to the number of three or more, armed with fire-arms or other offensive weapons, shall, within the united kingdom, or within the limits of any port, harbour, or creek thereof, be assembled in order to be aiding or assisting in the illegal landing, running, or carrying away of

expired; as the subsequent statutes (b), which continue the original act to the present time, do in terms continue only so

(b) Stat. 26 Geo. I. c. 32; 32 Geo. II. c. 18; 4 Geo. III. c. 12.

any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid, after seizure, from the officer of the customs or other officer authorized to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any act relating to the customs, or in the preventing the apprehension of any person who shall have been guilty of such offence, or in case any persons to the number of three or more, so armed as aforesaid, shall, within the united kingdom, or within the limits of any port, harbour, or creek thereof, be so aiding or assisting, every person so offending, and every person aiding, abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and suffer death as a felon.

Three persons at the least, must be present to constitute the offence of assembling armed for the purpose of running, or assisting to run, uncustomed goods.

It is not necessary that all should be armed; if some are armed, with the knowledge of the others, and those others are present aiding and assisting, it will be sufficient; *Rex v. Smith*, R. & R. C. C. 368. But the fact that some of the party are armed must be known to those who are unarmed, or the latter cannot be convicted; *Rex v. Southern*, Id. 444. These cases were decided upon the repealed Poaching Act, 57 Geo. III. c. 90; but they seem safe guides for the construction of the statute now referred to.

A variance between the indictment

and evidence, as to the kind of arms, does not seem material; if it is proved that the parties were armed either with "fire-arms," or such other "offensive weapons" as are within the meaning of the statute, it would seem to be sufficient; Archb. Cr. Pl. 469, 470. Not only guns, pistols, daggers, and other instruments of war, but also bludgeons, clubs, and other things commonly used as weapons, are within the meaning of the Act; *Rex v. Cosans*, 1 Leach, 342, 343 n. See *Rex v. Hutchinson*, 1 Leach, 342. But a common whip has been held not to be an offensive weapon; *Rex v. Fletcher*, 2 Str. 1166; and bats, which are long poles used by smugglers to carry tubs, have been also held not to be offensive weapons within the meaning of the repealed statute 6 Geo. IV. c. 108, § 56; *Rex v. Noakes*, 5 C. & P. 396. And so, even of a hatchet, if caught up suddenly and accidentally, in the heat of an affray; *Rex v. Rose*, 1 Leach, 342 n.

To bring a case within the statute, it must appear that the parties had deliberately assembled for the purpose charged in the indictment; but that purpose may be proved, either expressly, by the evidence of an accomplice, or the like; or impliedly, by evidence of circumstances from which the jury may fairly presume it; Archb. Cr. Pl. 470.

Reasonable proof must be given that the goods were uncustomed; but circumstantial evidence, from which the jury may fairly presume it, will be sufficient; *Rex v. Shelley*, 1 Leach, 340 n.

By sect. 60, if any person, being in company with more than four other persons, be found with any goods liable to forfeiture under this or any other Act relating to the revenue of Customs

much of the said act as relates to the *punishment* of the offenders, and not to the extraordinary method of apprehending

or Excise, or in company with *one* other person within five miles of the sea-coast, or of any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way, every such person shall be adjudged guilty of felony, and shall, on conviction of such offence, be transported as a felon for the space of seven years.

The evidence necessary to support an indictment upon this section may be sufficiently collected from the remarks above made upon sect. 58, and from the words of this section itself; it does not seem very clear, upon the latter branch of this section, whether both persons must be armed or disguised, or not; Archb. Cr. Pl. 472.

By sect. 59, if any person shall maliciously shoot at any vessel or boat belonging to his Majesty's navy, or in the service of the Revenue, within one hundred leagues of any part of the coast of the united kingdom, or shall maliciously shoot at, maim, or dangerously wound any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of Customs or Excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, being lawfully convicted, be adjudged guilty of felony, and suffer death as a felon.

The shooting at the vessel, and the shooting at or wounding the officer, must appear to have been *wilful*, and will then be presumed to have been *malicious*, until the contrary is shewn. We have seen, that if a Custom-house vessel fires upon a smuggling vessel, without having such a pendant and ensign flying as the law requires, the

returning the fire is not malicious; *Rex v. Reynolds*, R. & R. C. C. 465.

It must be shewn that the vessel was at the time belonging to his Majesty's navy, or employed in the service of the Revenue; which, it seems, may be done by parol evidence; Archb. Cr. Pl. 471; and that she was within one hundred leagues of some part of the coast of the united kingdom, and that the officer was at the time in the army, navy, or marines, on full pay, and employed for the prevention of smuggling. He must also be shewn to be an officer of the Customs, in the due exercise of his office; but evidence of his acting as such will be sufficient, without producing his commission or appointment; see sects. 117 and 118 of the statute.

By sect. 61, if any person shall by force or violence, assault, resist, oppose, molest, hinder, or obstruct any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of Customs or Excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty, such person, being thereof convicted, shall be transported for seven years, or sentenced to be imprisoned and kept to hard labour, for any term not exceeding three years.

By sect. 77, offences against the Act committed upon the high seas shall, for the purpose of prosecution, be deemed and taken to have been committed at the place on land into which the offender shall be brought, or in which he shall be found.

By sect. 117, persons employed in the prevention of smuggling, shall be deemed and taken to be duly employed, without proof of their appointment.

or causing them to surrender; and for offences of this positive species, where punishment, though necessary, is rendered so by the laws themselves, which by imposing high duties on commodities increase the temptation to evade them, we cannot surely be too cautious in inflicting the penalty of death (c).

3. fraudulent
bankruptcy, fe-
lony without
clergy;

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3. Another offence against public trade is fraudulent *bankruptcy*, which was sufficiently spoken of in a former *volume (d); I shall therefore here barely mention the several species of fraud taken notice of by the statute law: *viz.* the bankrupt's neglect of surrendering himself to his creditors; his non-conformity to the directions of the several statutes; his concealing or embezzling his effects to the value of 20*l.*; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made felony without benefit of clergy (e) (3).

(c) See vol. I. p. 317; Beccar. ch. 33.

(d) See vol. II. p. 481, 482.

(e) Stat. 5 Geo. II. c. 30.

By sect. 118, the commissions of officers in the army, &c. need not be produced in evidence upon any trial; and such officers shall be competent witnesses, although they may be entitled to a reward upon conviction.

And by sect. 122, offences against the Act may be tried in any county.

(3) By 6 Geo. IV. c. 16, which states in the preamble, that it is expedient to amend the laws relating to bankrupts, and to simplify the language thereof, and to consolidate the same so amended and simplified, in one Act, and to make other provisions respecting bankrupts, all laws relating to bankrupts are repealed, and all former provisions are reduced into this one Act. The different frauds taken notice of do not materially vary from those mentioned in the text.

By sect. 36, a bankrupt refusing to be sworn, or answer, or not fully answering, or to sign his examination, may be committed. A warrant of commitment for not signing the examination, need not set out the examination. The conclusion of such war-

rant, committing a bankrupt "until he shall full answers make to the satisfaction of the commissioners, and sign and subscribe his examination," is informal, but not defective in substance; *In re Leak*, 3 Y. & J. 46. As to commitment of witnesses by the commissioners, see *post*, 284, n. (10) at the end.

By sect. 99, it is enacted, that the bankrupt or other person swearing falsely before the commissioners shall be guilty of perjury, and suffer the pains and penalties in force against that offence.

By sect. 112, any bankrupt neglecting to surrender and submit himself to be examined; or refusing to make discovery of his estate and effects; or declining to deliver up his goods, books, and writings; or concealing or embezzling any part of his effects, to the value of 10*l.* with intent to defraud his creditors, shall be guilty of felony, and be liable to transportation for life, or not less than seven years, or to imprisonment for any term not exceeding seven years, as the court before whom he is convicted may adjudge. It being

And indeed it is allowed by such as are the most averse to the infliction of capital punishment, that the offence of fraudulent bankruptcy, being an atrocious species of the *crimen falsi*, ought to be put upon a level with those of forgery and falsifying the coin (*f*). And, even without actual fraud, if the bankrupt cannot make it appear that he is disabled from paying his debts by some casual loss, he shall by the statute 21 Jac. I. c. 19, be set on the pillory for two hours, with one of his ears nailed to the same, and cut off (4). To this head we may also subjoin, that by statute 32 Geo. II. c. 28, it is felony punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 100*l.*, neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors (5). And these are the only felonious offences against public trade; the residue being mere misdemeanors: as

4. Usury, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume (*g*). We there observed that by statute 37 Hen. VIII. c. 9, the rate of interest was fixed at 10*l.* *per cent. per annum*, which the statute 13 Eliz. c. 8, confirms: and ordains, that all brokers shall be guilty of a *præmunire* that transact any contracts for more, and the securities themselves shall be void. The statute 21 Jac. I. c. 17, reduced interest to eight *per cent.*; and, it having been lowered in 1650, during the usurpation, to six *per cent.*, the same reduction was re-enacted after the restoration by statute 12 Car. II. c. 13, and lastly, the statute 12 Ann. st. 2, c. 16, has reduced it to five *per cent* (6). Wherefore not only all con-

^{4.} usury, a misdemeanor;

(*f*) Beccar. ch. 34.

(*g*) See vol. II. p. 455, &c.

of the essence of the crime of embezzlement by a bankrupt, that the property embezzled is of the value limited by the statute, namely, 10*l.*; an indictment under this statute could not, it is presumed, be supported, unless it specifically enumerated the articles embezzled, and put a distinct value upon each individually; see *Rex v. Forsyth*, R. & R. C. C. 274.

(4) Repealed; see the preceding note.

(5) By the 33 Geo. III. c. 5, the debt is enlarged to 300*l.*—CH.

(6) The principal statute now in force concerning usury, is the 12 Ann. stat. 2, c. 16, though the other statutes mentioned in the text are not in express terms repealed.

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tracts for taking more are in themselves totally void, but also the lender shall forfeit treble the *money borrowed. Also if any scrivener or broker takes more than five shillings *per cent.* procuration-money, or more than twelve pence for making a bond, he shall forfeit 20*l.*, with costs, and shall suffer imprisonment for half a year. And by statute 17 Geo. III. c. 26, to take more than ten shillings *per cent.* for procuring any money to be advanced on any life-annuity, is made an indictable misdemeanor, and punishable with fine and imprisonment: as is also the offence of procuring or soliciting any infant to grant any life-annuity; or to promise, or otherwise engage, to ratify it when he comes of age (7).

5. Cheating, a
misdemeanor;

5. Cheating is another offence, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes, which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of *breaking the assize* of bread, or the rules laid down by law, and particularly by statutes 31 Geo. II. c. 29; 3 Geo. III. c. 11, and 13 Geo. III. c. 62, for ascertaining its price in every given quantity, is reducible to this head of cheating (8); as is likewise in a peculiar manner the offence of selling by *false weights and measures*; the standard of which fell under our consideration in a former volume (*h*) (9) (10). The punishment of bakers, breaking the

(*h*) See vol. I. p. 274.

(7) By 53 Geo. III. c. 141, this Act is repealed as to annuities granted since the 14th July, 1813. Similar provisions are however re-enacted in the new statute. An indictment will lie against a broker, under the 17 Geo. III. c. 26, § 7, for taking more than the brokerage limited by that Act; *Rex v. Gillham*, 6 T. R. 265.

(8) As to baking bread in London, or within ten miles of the Royal Exchange, see 3 Geo. IV. c. 106.

As to baking bread where an assize is set, and where no assize is set, and

as to standard wheaten bread, see several statutes, too long even for abridgment here, set out in 1 Chitty's Burn. tit. Bread, 404, et seq.

(9) Two acts have been lately passed for the prevention of false weights and balances; viz. the 35 Geo. III. c. 102, and the 37 Geo. III. c. 143. The latter materially alters the former.

By these it is enacted, that the justices at the petty sessions may appoint one person or more to examine the weights and balances within their district. These inspectors shall be sworn

assize, was anciently to stand in the pillory, by statute 51 Hen. III. st. 6, and for brewers, by the same act, to stand in

to the faithful discharge of their office ; and, as often as the justices shall direct, shall enter into any shop, mill, house, stall, or other premises of any person who shall sell by retail and weight, to search for and examine his weights and balances, and shall seize those which are not according to the standard in the Exchequer, and bring them before the justices at their petty sessions; and the offender being there convicted shall forfeit not less than 5s. nor more than 20s., at the discretion of the justices, together with costs, to be levied by distress. The false weights and balances are to be broken, and the materials sold. And whoever obstructs the inspectors in the execution of their duty, or shall refuse to produce his weights and balances to them, shall forfeit from 5s. to 40s.

The inhabitants of any parish, township, or place, may at a vestry meeting nominate any substantial householder or householders, who, if approved of by the justices, shall be the inspectors within that parish, township, or place ; but such nomination cannot be made till the inhabitants have procured standard weights to be paid for out of their poor-rates. The justices at the quarter sessions shall fix the allowance of the inspectors to be paid out of the county rate.

And they shall also order to be purchased out of the county rate standard weights, to be deposited with proper persons and in convenient places, which shall be produced to any person paying a reasonable sum for producing the same.

Prosecutions must commence within one month after the offence.—CH.

(10) But now see 5 Geo. IV. c. 74, (amended by 6 Geo. IV. c. 12,) by which many ancient statutes upon this subject are either wholly or partly repealed, and a uniformity of weights and

measures is established. The new Act, however, leaves unrepealed the 35 Geo. III. c. 102, and 37 Geo. III. c. 143, relating to weights ; the 36 Geo. III. c. 86, relating to butter ; the 55 Geo. III. c. 43, relating to measures ; and the 3 Geo. IV. c. 77, § 21, relating to the size of brewers' casks.

With reference to former statutes on this subject, the following decisions may be cited, as not wholly inapplicable to the present law. It is illegal to sell corn by any other measure than the Winchester bushel ; *Rex v. Major*, 4 T. R. 750. The buyer of corn by any other than the Winchester measure, is subject to the penalty of 40s., in addition to the value of the corn so bought, by 22 & 23 C. II. c. 12 ; *Rex v. Arnold*, 5 T. R. 355. A contract for the sale of corn by the hobbett, is in contravention of the provisions of 22 & 23 C. II. c. 12, and an action will not lie for the breach of it ; *Tyson v. Thomas*, 1 M'Clel. & Y. 119. But, after the 1st of January, 1826, a sale may be effected by any local weight or measure, if the ratio of such weight or measure to the standard weight or measure, be specified in terms ; *Id.* 128. A contract described as having been made for a certain number of bushels of corn must be considered as a contract for that number of statute bushels ; *Hockin v. Cooke*, 4 T. R. 314 ; 1 Chit. 28 (a). A custom that every pound of butter sold in a particular market town shall weigh eighteen ounces, is bad ; *Noble v. Durell*, 3 T. R. 171. The 37 Geo. III. c. 143, § 1, by which the justices at their respective petty sessions within the divisions, districts, and other places of the several counties of England, are authorized to appoint examiners of weights and balances, extends only to such divisions, &c. as were known and recognized at the time when the Act

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the tumbrel or dungcart (*i*) : which, as we learn from Domesday book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the confessor. "*Malam cerevisiam faciens, in cathedra ponebatur stercoreis (j).*" But now the general punishment for all frauds *of this kind, if indicted, as they may be, at common law, is by fine and imprisonment; though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade, or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory (*k*). And by the statutes 33 Hen. VIII. c. 1, and 30 Geo. II. c. 24, if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, (pillory,) trans-

(*i*) 3 Inst. 219.(*k*) 1 Hawk. P. C. 188.(*j*) Seld. tit. of hon. b. 2, c. 5, § 3.

passed; and such an appointment made at a petty sessions, by two justices, for a district which they had, without the consent of the other magistrates, recently created, was held illegal; *Rex v. Justices of Devon*, 1 B. & A. 588. Where the reddendum in a renewed hospital lease was so many quarters of corn, it was held that it must be taken to mean legal quarters, reckoning the bushel at eight gallons, though the old leases, before the 22 & 23 C. II. c. 12, contained the same reddendum; and though, till lately, the lessees paid by composition, reckoning the bushel at nine gallons; *St. Cross Hospital v. Howard de Walden*, 6 T. R. 388. There is one case bearing upon the new statute; in *Watts v. Friend*, Kent Summer Assizes, 1828, before Lord Tenterden, an action of assumpsit for not delivering turnip seed, there was a verbal contract for the sale of the seed while the turnips were growing. The sale was by the

strike, and by the Winchester measure. The parties knew that the imperial standard was the legal measure. Lord Tenterden said, that parties must, since the new Act, virtually contract to sell by the Imperial measure, and, if not, they must state the terms of their bargain in the very words of their contract, or the object of the statute would be defeated. And his lordship reserved the point, whether the plaintiff could recover upon the verbal contract; ED. MSS. And afterwards, upon the case coming before the full court of King's Bench, they seemed to be of opinion that since the passing of the 5 Geo. IV. c. 74, an agreement to sell by the Winchester bushel, not containing any declaration of the proportion which that measure bears to the Imperial bushel, was void; *Watts v. Friend*, 10 B. & C. 446. See generally on this subject, 2 Chit. Com. Law, 168 to 179; 3 Harrison's Digest, 2178-9.

portation, whipping, or other corporal pain, as the court shall direct (11) (12).

(11) In an indictment for this offence, the false pretences must be particularly stated and specified; *Rex v. Mason*, 2 T. R. 581.

If two or more act in concert in obtaining money or goods by a false pretence, they may all be joined in the same indictment, and may be all convicted; *Rex v. Young*, 3 T. R. 98.

A false assertion or affirmation, without an artful device or contrivance, will not amount to a false pretence; and therefore it has been determined that it is not a false pretence within the statute to purchase goods, and to give a bill for them, drawn upon a banker, with whom the drawer has no effects; *Rex v. Lara*, 6 T. R. 565.

It has been held to be a false pretence within the statute that the defendant had made a bet upon a race to be run upon a future day, by which false representation he obtained a sum of money from the prosecutor to let him have a share of the wager; *Rex v. Young*, 3 T. R. 828.

Also a pretence by a man, that he was employed by a nobleman to carry horses to Ireland, and that he had been detained by contrary winds, till his money was gone; *Ibid*.

So where a man pays a number of workmen and receives from a clerk what is due to them, if he represents that more is due to them than is actually so, he may be indicted for obtaining the difference under a false pretence; *Witchell's case*, East, P. C. 830. —CH.

(12) By 52 Geo. III. c. 63, these provisions were extended to bonds, bills of exchange, bank notes, securities, or orders for the payment of money, and to the transfer of goods, or any valuable article whatsoever: and now, by 7 & 8 Geo. IV. c. 29, § 53, reciting, "that a failure of justice frequently arises from the subtle distinction be-

tween larceny and fraud," it is, "for remedy thereof," enacted, "that if any person shall, by any false pretence, obtain from any other person any chattel, money, or other valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported for seven years, or to suffer fine, or imprisonment, or both, as the court shall award; provided, that if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by certiorari; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." In an indictment under this statute, according to the rules of construction applicable to former statutes on this subject, which seem equally applicable to this, the pretences must be set forth, and must be negatived by special averments; 2 T. R. 581; 2 M. & S. 379. The whole of the pretence charged need not, however, be proved; proof of part of the pretence, and that the property was obtained thereby, is sufficient; *Rex v. Hill*, R. & R. C. C. 190. Obtaining goods by fraudulently giving in payment a check upon a banker with whom the party keeps no cash, and which he knows will not be paid, has been held an indictable offence, and would, it seems, be such within this statute; *Rex v. Jackson*, 3 Camp. 370. The language of the 30 Geo. II. c. 24, made the offence of obtaining money upon false pretences consist in the actually obtaining the money, and not in using a false pre-

6. forestalling, a
misdemeanor;

6. The offence of *forestalling* the market is also an offence against public trade. This, which, as well as the two following, is also an offence at common law (*l*), was described by statute 5 and 6 Edw. VI. c. 14, to be the buying or contracting for any merchandize or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader.

7. regrating, a
misdemeanor;

7. Regrating was described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

8. engrossing, a
misdemeanor;

8. Engrossing was also described to be the getting into one's possession, or buying up, large quantities of corn or other dead victuals, with intent to sell them again (*13*). This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity, with intent to sell it at an unreasonable *price, is an offence indictable and finable at the common law (*m*). And the general penalty for these three offences by the common law, for all the statutes concerning them were repealed by 12 Geo. III. c. 71, is, as in other minute misdemesnors, discretionary fine and imprisonment (*n*). Among

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(*l*) 1 Hawk. P. C. 234.

(*n*) 1 Hawk. P. C. 235.

(*m*) Cro. Car. 232.

tence for the purpose of obtaining the money; it has been held, therefore, that, in an indictment on that statute, the venue must be laid in the county where the money is obtained, and not in the county where the false pretence is used; *Rex v. Buttery*, cited in *Pearson v. McGowran*, 5 D. & R. 616; 3 B. & C. 700, per Abbott, C. J. Where the fraud practised is properly the ground for a civil action, an indictment for obtaining money by false pretences cannot be supported; *Rex v.*

Codrington, 1 C. & P. 661. See further upon this subject, 2 East, P. C. 673, 818, 819, 829, 830; 6 T. R. 565; R. & R. C. C. 81, 127, 317, 504.

(13) Corn may be purchased for the purpose of storing it in granaries, and re-sale, by 31 Geo. III. c. 30; and assaults, with intent to obstruct the buying or selling of grain, or the free passage thereof, are by 9 Geo. IV. c. 31, § 26, punishable summarily before two magistrates, by imprisonment and hard labour.

the Romans these offences and other mal-practices to raise the price of provisions, were punished by a pecuniary mulct (14). "*Pœna viginti aureorum statuitur adversus eum, qui contra annonam fecerit, societatemve coierit quo annona carior fiat* (o) (15)."

9. Monopolies are much the same offence in other branches of trade, that engrossing is in provisions: being a licence or privilege allowed by the king for the sole buying and selling, making, working, or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before (p). These had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by Sir Edward Coke (q), in the beginning of the reign of king James the first; but were in great measure remedied by statute 21 Jac. I. c. 3, which declares such monopolies to be contrary to law and void; except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions (16); and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot; and monopolists are punished with the forfeiture of treble damages and double costs, to those whom they attempt to disturb; and if they procure any action, brought against them for these damages, to be stayed by any extrajudicial order, other than of the court wherein it is brought, they incur the penalties of a *præmunire*. Combinations also among victuallers or artificers, to raise the price of provisions (17), or any commodities, or the rate of labour (18) (19), are in many cases severely punished

9. monopoly, a misdemeanor, except by patent;

(o) Ff. 48, 12, 2.

(q) 3 Inst. 181.

(p) 1 Hawk. P. C. 231.

(14) As to offences which come under the three last heads, see the case of *Rex v. Waddington*, (which was fully discussed at the bar, and maturely considered by the bench,) 1 East, 143, 145; see also 3 M. & S. 67, as to conspiring to raise the public funds with intent to injure purchasers, which is an indictable offence.

(15) "A penalty of twenty pieces of gold is imposed upon him who prevents the supply of provisions, or persuades other persons to raise the price of provisions."

(16) See vol. II. c. 26, on this subject.

(17) An information will be granted for a combination to fix the price of salt; *Rex v. Norris*, 2 Ld. Ken. 300.

(18) These combinations are conspiracies by the common law, and are punishable as misdemeanors at the discretion of the court; see *ante*, p. 137, n. (33).

The most common combination is that of journeymen manufacturers to obtain an advance of wages.

Any one workman may refuse to

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by particular statutes; and, in general, by statute 2 and 3 Edw. VI. c. 15, with the forfeiture of 10*l.* or twenty days' imprisonment, with an allowance of only bread and water, for the first offence; 20*l.* or the pillory, for the second; and *40*l.* for the third, or else the pillory, loss of one ear, and perpetual infamy. In the same manner, by a constitution of the emperor Zeno (*r*), all monopolies and combinations to keep up the price of merchandize, provisions, or workmanship, were prohibited, upon pain of forfeiture of goods and perpetual banishment.

10. exercising a trade not having served an apprenticeship, a misdemeanor;

10. To exercise a *trade* in any town, without having previously served as an *apprentice* for seven years (*s*), is looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader; and therefore is punished by statute 5 Eliz. c. 4, with the forfeiture of forty shillings by the month (20).

(*r*) Cod. 4, 59, 1.

(*s*) See vol. I. p. 427.

work till he is paid the price he pleases to fix upon his own labour; but, if two or more enter into an engagement of this kind, such associations being so injurious to the interests of the public, they are guilty of a conspiracy, and may be prosecuted by an indictment or an information. But combinations amongst workmen had become so frequent that it was thought expedient to repress them by a speedier process, and therefore the 40 Geo. III. c. 106 enacted, that every person combining with others to advance their wages, or decrease the quantity of work, or any way to affect or control those who carried on any manufacture or trade in the conduct and management thereof, may be convicted before one justice of the peace, and may be committed to the common gaol, for any time not exceeding three calendar months, or be kept to hard labour in the House of Correction for two months.—CH.

(19) By the 6 Geo. IV. c. 129, § 1, all Acts relative to combinations of workmen, or masters, as to wages, time of working, quantity of work, &c.

are repealed. By sect. 2, persons compelling journeymen to leave their employment, or to return work unfinished, preventing them from hiring themselves, compelling them to belong to clubs, &c. or to pay fines, or forcing manufacturers to alter their mode of carrying on their business, are punishable with imprisonment, with or without hard labour, for three months. The remaining clauses provide for the mode of conviction of offenders before justices of the peace. For the form and requisites of convictions for these offences under former Acts of parliament, see *Rex v. Nield*, 6 East, 417; *Rex v. Ridgway*, 1 D. & R. 123; 5 B. & A. 527; *Paley on Convictions*, 2d Ed. by Dowling, 99 et seq. By 9 Geo. IV. c. 31, § 25, assaults in pursuance of any conspiracy to raise the rate of wages, and sect. 26, assaults upon certain workmen to prevent them from working at their trades, are punishable with imprisonment and hard labour.

(20) The 54 Geo. III. c. 96, § 1, repeals so much of the 5 Eliz. c. 4, as

11. Lastly, to prevent the destruction of our home manufactures, by *transporting and seducing our artists* to settle abroad, it is provided by statute 5 Geo. I. c. 27, that such as so entice or seduce them shall be fined 100%. and be imprisoned three months ; and for the second offence shall be fined at discretion, and be imprisoned a year : and the artificers, so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By statute 23 Geo. II. c. 13, the seducers incur, for the first offence, a forfeiture of 500%. for each artificer contracted with to be sent abroad, and imprisonment for twelve months ; and for the second, 1000%. and are liable to two years' imprisonment : and by the same statute, connected with 14 Geo. III. c. 71, if any person exports any tools or utensils used in the silk, linen, cotton, or woollen manufactures, excepting wool-cards to North America (*t*), he forfeits the same and 200%. and the captain of the ship, having knowledge thereof, 100%. ; and, if any captain of a king's ship, or officer of the customs, knowingly suffers such exportation, he forfeits 100%. and his employment ; and is for ever made incapable of bearing any public office : and every person collecting such tools or utensils, in order to export the same ; shall on conviction at the assizes forfeit such tools and also 200%. (21).

11. transporting, or residing abroad, of artificers, a misdemeanor, also exporting tools or machinery.

(*t*) Stat. 15 Geo. III. c. 5.

provides that persons shall not exercise any art or manual occupation, except they had served an apprenticeship of seven years. Sect. 2 renders valid certain indentures of apprenticeship which would have been void by certain provisions in the old Act, and repeals the part of the Act containing such provisions. Sect. 3 provides that justices may determine complaints respecting apprenticeships as heretofore. And sect. 4 provides, that the customs

of London concerning apprentices are not to be affected. For the decisions upon the 5 Eliz. c. 4, respecting the exercising of trades by unqualified persons, see 1 *Harrison's Digest*, 820 ; 3 *Id.* 2077.

(21) All the statutes prohibiting artificers from going abroad are repealed by 5 Geo. IV. c. 97 ; so that artists may now settle in foreign parts without any restrictions or liabilities.

CHAPTER XIII.

OF OFFENCES AGAINST THE PUBLIC HEALTH,
AND THE PUBLIC POLICE OR ECONOMY.

Offences against
the public health
are,

1. irregularity
in time of
plague, or qua-
rantine, a felony
with, and with-
out clergy ;

THE fourth species of offences, more especially affecting the commonwealth, are such as are against the public *health* of the nation : a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.

1. The first of these offences is a felony ; but, by the blessing of Providence for more than a century past, incapable of being committed in this nation. For by statute 1 Jac. I. c. 31, it is enacted, that if any person infected with the plague, or dwelling in any infected house, be commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it ; he may be enforced, by the watchmen appointed on such melancholy occasions, to obey such necessary command : and, if any hurt ensue by such enforcement, the watchmen are thereby indemnified. And further, if such person so commanded to confine himself goes abroad, and converses in company, if he has no plague sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behaviour : but, if he has any infectious sore upon him, uncured, he then shall be guilty of felony. By the statute 26 Geo. II. c. 26, explained and amended by 29 Geo. II. c. 8, the *method of performing *quarantine*, or forty days' probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the *lazarets*, or places wherein quarantine is to be performed ; and officers and watchmen neglecting their duty ; and persons con-

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veying goods or letters from ships performing quarantine (1).

2. A second, but much inferior, species of offence against public health is the selling of *unwholesome provisions*. To prevent which the statute 51 Hen. III. st. 6, and the ordinance for bakers, c. 7, prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II. c. 25, § 11, any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant; and 40*l.* if done by the vintner or retail trader. These are all the offences which may properly be said to respect the public health (2).

2. selling unwholesome provisions, a misdemeanor.

(1) By 6 Geo. IV. c. 78, all former acts relating to quarantine are repealed, and other provisions substituted, establishing certain pecuniary fines for the different offences therein set forth: these provisions are similar to those set forth in former statutes.

By § 21, all parties guilty of deserting their duty, or officers permitting any person, or goods, to leave a lazaret vessel, or giving false certificates, are guilty of felony. By § 25, persons altering or forging any certificate, or publishing any false certificate, are to be deemed guilty of felony.

Sec. 28 empowers consuls and vice-consuls to administer oaths in cases respecting quarantine. And by sec. 29, parties making false oaths, or procuring others to do so, touching quarantine, are to be punished, as in cases of perjury or subornation of perjury.

The repealed statute 26 G. II. c. 6. § 1, enacted, that persons going on board ships coming from infected places should obey such orders as the king in council should make, without annexing any particular punishment: it was held, that the disobeying such an order was an indictable offence, and punishable as a misdemeanor at common law; *Rex*

v. Harris, 4 T. R. 202. And see 2 Leach, 549.

A person may be indicted for unlawfully and injuriously carrying a child infected with the small pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects; *Rex v. Vantandillo*, 4 M. & S. 73.

It is an indictable offence for an apothecary unlawfully and injuriously to inoculate children with the small pox, and, while they are sick of it, unlawfully and injuriously to cause them to be carried along a public street; *Rex v. Burnett*, 4 M. & S. 272.

(2) Selling adulterated wine, or adulterating it, is punishable with fine and imprisonment, by 1 W. & M. st. 1, c. 24, § 20. So the mixing alum with bread in a manner to render it unwholesome is an indictable offence; *Rex v. Dixon*, 4 Camp. 12; 3 M. & S. 11. But it would seem that an indictment does not lie against a miller for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal different from the produce of the barley, and which is musty and unwholesome; *Rex v. Haynes*, 4 M. & S. 214.

Offences against the public police are, some felonies, and others misdemeanors, as,

V. The last species of offences which especially affect the commonwealth are those against the public *police* and *economy*. By the public police and economy I mean the due regulation and domestic order of the kingdom : whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners ; and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding species. These amount, some of them to felony, and others to misdemeanors only. Among the former are,

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1. those relating to clandestine or irregular marriages, felonies, with or without clergy ;

1. The offence of *clandestine marriages* ; for, by the statute 26 Geo. II. c. 33 ; 1. To solemnize marriage in any other place besides a church, or public chapel wherein banns have been usually published, except by licence from the archbishop of Canterbury ; and, 2. To solemnize marriage in such church or chapel without due publication of banns, or licence obtained from a proper authority : do both of them not only render the marriage void, but subject the person solemnizing it to felony, punished by transportation for fourteen years ; as, by three former statutes (*a*), he and his assistants were subject to a pecuniary forfeiture of 100*l*. 3. To make a false entry in a marriage register ; to alter it when made ; to forge, or counterfeit, such entry, or a marriage licence ; to cause or procure, or act or assist in such forgery ; to utter the same as true, knowing it to be counterfeit ; or to destroy or procure the destruction of any register, in order to vacate any marriage, or subject any person to the penalties of this act ; all these offences, knowingly and wilfully committed, subject the party to the guilt of felony without benefit of clergy (3).

(*a*) 6 & 7 W. III. c. 6 ; 7 & 8 W. III. c. 35 ; 10 Ann. c. 19, § 176.

(3) The 26 Geo. II. c. 33, and all subsequent acts upon this subject, are repealed by 4 Geo. IV. c. 76 ; by § 21 of which it is provided, that persons solemnizing marriages in any other place

than a church or chapel, or without banns or licence, or under pretence of being in holy orders, shall be transported for fourteen years ; by § 22, that all marriages solemnized under any of the

2. Another felonious offence, with regard to this holy estate of matrimony, is what some have corruptly called *bigamy*, which properly signifies being twice married; but is more justly denominated *polygamy*, or having a plurality of wives at once (*b*). Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the *ecclesiastical law of England: and yet the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well-ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors, who, as Tacitus informs us (*c*), “*prope soli bar-*

2. bigamy, or polygamy, a felony, with some exceptions;

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(*b*) 3 Inst. 88. Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or in once marrying a widow. Such were esteemed incapable of orders, &c.; and by a canon of the council of Lyons, A.D. 1274, held under pope Gregory X. were *omni privilegio clericali nudati et coercioni fori secularis addicti*. (6 Decretal. l. 12.) This canon was adopted and explained in England, by statute 4 Edw. I. st. 3, c. 5; and *bigamy* thereupon became

no uncommon counterplea, to the claim of the benefit of clergy. (M. 40 Edw. III. 42; M. 11 Hen. IV. 11, 48; M. 13 Hen. IV. 6. Staunf. P. C. 134.) The cognizance of the plea of *bigamy* was declared, by statute 18 Edw. III. st. 3, c. 2, to belong to the court christian, like that of *bastardy*. But by stat. 1 Edw. VI. c. 12, § 16, *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dalt. 21; Dyer, 201.

(*c*) De mor. Germ. 18.

circumstances prohibited by the preceding clause, shall be null and void; by § 23, that where marriages are solemnized between parties under age, contrary to this act, by false oath or fraud, the guilty party shall forfeit all property accruing from the marriage; and, by § 29, that persons convicted of making, or causing to be made, any false entry in any register book, or any licence relating to any marriage, or altering, forging, or counterfeiting, or assisting in altering, &c., or causing to be altered, &c., any such

entry or licence, or destroying or causing to be destroyed any such register book, shall be transported for life. A clergyman celebrating a marriage by banns, without making the inquiry directed by the statute, is liable to ecclesiastical censure at least; perhaps to other consequences; *Nicholson v. Squire*, 16 Ves. 259.

A prohibition was granted in a suit in the spiritual court, for marrying without banns or licence, because it was a matter of temporal jurisdiction; *Campbell v. Aldrich*, 2 Wils. 79.

barorum singulis uxoribus contenti sunt (6)." It is therefore punished by the laws both of ancient and modern Sweden with death (*d*). And with us in England it is enacted by statute 1 Jac. I. c. 11, that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony; but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife; but the second may, for she is indeed no wife at all (*e*); and so, *vice versa*, of a second husband. The act makes an exception to five cases, in which such second marriage, though in the three first it is void, is yet no felony (*f*). 1. Where either party hath been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce, or separation *a mensâ et thoro*, by sentence in the ecclesiastical court (7). 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo* (8). Or, 5. Where either of the parties was under the age of consent at the time of the first marriage, for in such case the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to. But *if at the age of consent the parties had agreed to the marriage, which completes the contract, and is

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(*d*) Stiernh. de jure Sueon. l. 3, c. 2.
(*e*) 1 Hal. P. C. 693.

(*f*) 3 Inst. 89; Kel. 27; 1 Hal
P. C. 694.

(6) "Almost the only race of barbarians who were contented with one wife."

(7) But if a person marries again under the three first exceptions, though the second marriage is not felony, yet as before the statute it is null and void, and the parties will be subject to the censures and punishment of the Ecclesiastical courts.—CH.

(8) In the Duchess of Kingston's case the judges were unanimously of opinion, "That a sentence in the

Spiritual court against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage in an indictment for polygamy. And admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion;" 11 *Harg. St. Tr.* 262.—CH.

indeed the real marriage; and afterwards one of them should marry again; I should apprehend that such second marriage would be within the reason and penalties of the act (9).

(9) By 9 Geo. IV. c. 31, § 22, it is enacted, "That if any person being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or House of Correction, for any term not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county: provided always, that nothing herein contained shall extend to any second marriage, contracted out of England by any other than a subject of his Majesty, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

Three important improvements in the law relating to bigamy are introduced by this enactment. First, the offence is now punishable wherever committed; formerly it was not punishable at all, if committed out of the jurisdiction of England. Secondly, the absence of one party for seven years abroad, will not now excuse the second

marriage, if such party be known by the other party to have been alive within that period; formerly the mere absence was a protection, though the absent party was well known by the other to be living. Thirdly, a divorce *a vinculo* alone will now justify the second marriage; formerly a divorce *a mensâ et thoro* was held sufficient. 1 East, P. C. 466. In a prosecution for bigamy it has been said, that a marriage in fact must be proved; *Morris v. Miller*, 4 Burr. 2059; but see *Trueman's case*, 1 East, P. C. 470; but if proved by a person who was present, it does not seem necessary to prove the registry or licence; *Rex v. Allison*, R. & R. C. C. 109; and it matters not that the first marriage is voidable, by reason of affinity, &c.; 3 Inst. 88. Parties who are within age at the time of the first marriage, subsequently affirming the union by their consent, will be liable to be punished for bigamy if they break that contract and marry again; 1 East, P. C. 468. On an indictment for bigamy, where the first marriage is in England, it is not a valid defence to prove a divorce *a vinculo* out of England before the second marriage, founded on grounds on which a divorce *a vinculo* could not be obtained in England; *Rex v. Lolley*, R. & R. C. C. 237, cited in *Tovey v. Lindsay*, 1 Dow. 117. The burthen of proving the first marriage to have been legal, lies upon the prosecutor; *Rex v. James*, R. & R. C. C. 17; *Rex v. Morton*, id. 19; *Rex v. Butler*, id. 61. The Act extends to all dissenters except Jews and Quakers. Upon the subject of bigamy generally, see 1 Hawk. P. C. c. 32; 1 East, P. C. c. 12; 1 Russell, c. 23; Butler's Co. Litt. 79, b. n. 1; 3 Stark, Ev. Polygamy. 1 Harrison's Digest, 750, Bigamy.

3. wandering by soldiers or mariners, a felony without clergy;

3. A third species of felony against the good order and economy of the kingdom, is by idle *soldiers* and *mariners* wandering about the realm, or persons pretending so to be, and abusing the name of that honourable profession (*g*). Such a one not having a testimonial or pass from a justice of the peace, limiting the time of his passage; or exceeding the time limited for fourteen days, unless he falls sick; or forging such testimonial; is by statute 39 Eliz. c. 17, made guilty of felony without benefit of clergy. This sanguinary law, though in practice deservedly antiquated, still remains a disgrace to our statute-book: yet attended with this mitigation, that the offender may be delivered, if any honest freeholder or other person of substance will take him into his service, and he abides in the same for one year; unless licensed to depart by his employer, who in such case shall forfeit ten pounds (10) (11).

4. remaining in England by Egyptians or gypsies, a felony without clergy; importing such, a misdemeanor;

4. Outlandish persons calling themselves *Egyptians*, or *gypsies*, are another object of the severity of some of our unrepealed statutes. These are a strange kind of commonwealth among themselves of wandering impostors and jugglers, who were first taken notice of in Germany about the beginning of the fifteenth century, and have since spread themselves all over Europe. Munster (*h*), who is followed and relied upon by Spelman (*i*) and other writers, fixes the time of their first appearance to the year 1417; under passports, real or pretended, from the emperor Sigismund, king of Hungary. And pope Pius II., who died A. D. 1464, men-

(*g*) 3 Inst. 85.

(*i*) Gloss. 193.

(*h*) Cosmogr. l. 3.

(10) In the Vagrant Act, the 17 Geo. II. c. 5, there is an exception in favour of soldiers having certificates from their officers, or the secretary at war; and also in favour of mariners having a testimonial from a justice of peace, who were thus licensed to beg. But by 32 Geo. III. c. 45, such certificates and testimonials were very properly declared to be null and void, and that all soldiers and mariners who should wander abroad and beg, should be deemed rogues and vagabonds within the meaning of the Vagrant Act.—CH.

(11) This Act is now repealed by 52 Geo. III. c. 31. Soldiers, sailors, and mariners, with their wives, are relieved against the penalties of the different Vagrant Acts by 43 Geo. III. c. 61; vide Annual Mutiny Act, and 58 Geo. III. c. 92. It was held that a common soldier could not be a vagrant under the repealed statute of 17 G. 2. *Soldier's case*, 1. Wils. 331; and see *Rex v. Patchett*, 5 East, 339; 1 Smith, 547; and *Rex v. Brown*, 8 T. R. 26.

tions them in his history as thieves and vagabonds, then wandering with their families over Europe, under the name of Zigari; and whom he supposes to have migrated from the country of the *Zigi, which nearly answers to the modern Circassia. In the compass of a few years they gained such a number of idle proselytes, who imitated their language and complexion, and betook themselves to the same arts of chiro-mancy, begging, and pilfering, that they became troublesome and even formidable to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591 (*k*). And the government in England took the alarm much earlier; for, in 1530, they are described by statute 22 Hen. VIII. c. 10, as “outlandish people, calling themselves Egyptians, using no craft nor feat of merchandize, who have come into this realm and gone from shire to shire and place to place in great company, and used great, subtle, and crafty means to deceive the people; bearing them in hand, that they by palmestry could tell men’s and women’s fortunes; and so many times by craft and subtlety have deceived the people of their money, and also have committed many heinous felonies and robberies.” Wherefore they are directed to avoid the realm, and not to return under pain of imprisonment, and forfeiture of their goods and chattels: and, upon their trials for any felony which they may have committed, they shall not be entitled to a jury *de medietate linguæ*. And afterwards, it is enacted by statute 1 and 2 Ph. and M. c. 4 (12), and 5 Eliz. c. 20, that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l*. And if the Egyptians themselves remain one month in this kingdom; or if any person, being fourteen years old, whether natural-born subject or stranger, which hath been seen or found in the fellowship of such Egyptians, or which hath disguised him or herself like them, shall remain in the same one month, at one or several times; it is felony without benefit of clergy; and Sir Matthew Hale informs us (*l*), that at one Suffolk assizes no less than thirteen gypsies were ex-

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(*k*) Dufresne, Gloss. I. 200.(*l*) 1 Hal. P. C. 671.

(12) 1 & 2 P. & M. c. 4, is repealed by the 1 Geo. IV. c. 116, as relates to the infliction of capital punishment. Such parties are now punishable as idle and disorderly persons by 5 Geo. IV. c. 83.

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cuted upon these statutes a few years before the restoration. But, to the honour of our *national humanity, there are no instances more modern than this, of carrying these laws into practice.

5. common nuisances; as, annoyances in highways, &c., offensive trades, disorderly houses, lotteries, fireworks, eves-dropping, common scolding, all misdemeanors.

5. To descend next to offences, whose punishment is short of death. *Common nuisances* are a species of offences against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires (*m*). The nature of *common* nuisances, and their distinction from *private* nuisances, were explained in the preceding volume (*n*); when we considered more particularly the nature of the private sort, as a civil injury to individuals. I shall here only remind the student, that common nuisances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damns him in common only with the rest of his fellow-subjects. Of this nature are, 1. Annoyances in *highways*, *bridges*, and public *rivers*, by rendering the same inconvenient or dangerous to pass: either positively, by actual obstructions; or, negatively, by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or, in default of these last, the parish at large, may be indicted, distrained to repair and amend them, and in some cases fined. And a presentment thereof by a judge of assize, &c. or a justice of the peace, shall be in all respects equivalent to an indictment (*o*). (13). Where there is an house erected, or an enclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture* (*p*) (14). 2. All those kinds of nuisances, such

(*m*) 1 Hawk. P. C. 197.

(*n*) Vol. III. page 216.

(*o*) Stat. 7 Geo. III. c. 42.

(*p*) Co. Litt. 277, from the French *pourpris*, an enclosure.

(13) By the new highway act, 5 & 6 W. IV. c. 50, the proceeding by presentment for the non-repair of highways is abolished, and a summary mode of proceeding before magistrates substituted.

(14) By 7 & 8 Geo. IV. c. 30, § 13, pulling down any public bridge, or doing any injury thereto, with intent to obstruct the thoroughfare, is punishable as a felony with transportation

as offensive trades and manufactures, which when injurious to a private man are actionable, are, when detrimental to the public, *punishable by public prosecution and subject to fine according to the quantity of the misdemeanor; and particularly the keeping of hogs in any city or market-town is indictable as a public nuisance (q) (15). 3. All disorderly inns

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(q) Salk. 460.

for life, or not less than seven years, or imprisonment not exceeding four years, and one, two, or three public whippings if a male offender; vide ante 144. And by the preceding § 12, cutting piles, chalk, or other materials, fixed in the ground to secure any sea bank or wall, or the bank of any river, canal, or marsh, or drawing up any floodgate with intent to commit mischief, or to obstruct the navigation of the same, is punishable with transportation for seven years, or imprisonment, not exceeding two years, with private or public whipping for male offenders, at the discretion of the court, in addition.

(15) An indictment, as for a nuisance, lies for placing a person in a footway in a public street in London, to deliver out printed bills of the defendant's occupation, whereby the footway is obstructed; *Rex v. Sarmon*, 1 Burr. 516. So, for keeping stage-coaches plying in the public streets; *Rex v. Cross*, 3 Camp. 224. So, for cutting logs of timber in a public street; *Rex v. Jones*, id. 230. So, for erecting buildings near a highway and dwelling-houses, and there making spirit of sulphur, whereby the air is poisoned; *Rex v. White*, 1 Burr. 333. So, for obstructing one side of a highway by means of waggons loading and unloading for several hours at a time; *Rex v. Russell*, 6 East, 427; 2 Smith, 424. So, for slaughtering horses within a certain distance of dwelling-houses; *Rex v. Watts*, 2 C. & P. 486. So for conveying the refuse of gas into a public river, whereby the fish are destroyed; *Rex v. Medley*, 6 C. & P. 292. So for exhibiting effigies at the windows

of a house in a public street, and thereby attracting a crowd to look at them, which causes the footway to be obstructed; *Rex v. Carlile*, 6 C. & P. 636. To support an indictment for a nuisance, it is not necessary that the smells produced by it should be injurious to the health, it is sufficient if they are offensive to the senses; *Rex v. Neil*, 2 C. & P. 485. But it must appear either that the nuisance is destructive to the general health of the inhabitants, or that it renders their dwellings uncomfortable or untenable; *Rex v. Davey*, 5 Esp. 217. And an indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place; *Rex v. Lloyd*, 4 Esp. 200. Where the manufacture had been carried on near fifty years in the neighbourhood, the defendant was acquitted; *Rex v. Neville, Peake*, 93. So a man setting up a noxious trade in a neighbourhood where such trade has been long carried on, is not indictable, unless the noxious vapour is greatly increased in his manufacture; Id. 96. And if a party set up a noxious trade remote from houses and public roads, and afterwards new houses are built, and new roads constructed near it, he may continue his trade, although it be a nuisance to persons inhabiting those houses and frequenting those roads; *Rex v. Cross*, 2 C. & P. 483. Steam-engines may be indictable as nuisances. The 1 & 2 Geo. IV. c. 41, after reciting that injury is sustained from the improper construction, as well as from the negligent use of furnaces employed in the working of engines by steam, and that every such nuisance being of

or *alehouses*, *bawdy-houses*, *gaming-houses*, *stage-plays* unlicensed, booths and stages for *rope-dancers*, *mountebanks*, and the like, are public nuisances, and may upon indictment be suppressed and fined (*r*) (16). Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the innkeepers fined, if they refuse to entertain a traveller without a very sufficient cause: for thus to frustrate the end of their institution is held to be dis-

(*r*) 1 Hawk. P. C. 198, 225.

a public nature is abateable by indictment, enacts, that if it shall appear to the court by which judgment ought to be pronounced, in case of conviction in any such indictment, that the grievance may be remedied by altering the construction of the furnace, it shall be lawful to the court, without the consent of the prosecutor, to make such order, touching the premises, as shall be by the said court thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant. Proviso, not to extend to owners of furnaces erected solely for working mines. The court may award costs to the prosecutor to be paid by the party convicted.

(16) See *ante*, 64 et seq. in notis, on these subjects. The keeping of bawdy-houses, gaming-houses, and disorderly houses of all descriptions, together with the unlawful pastimes there pursued, has been from time to time prohibited by various Acts of parliament, (see them collected in *Collyer's Criminal Statutes*, Nuisance, 399, et seq.) imposing various punishments and penalties upon offenders: and, by the 3 Geo. IV. c. 114, such offenders are punishable by sentence of imprisonment with hard labour, for any term not exceeding the term for which the court before which they are convicted may now imprison for such offences, either in addition to or in lieu of any other punishment which might have been inflicted on such offenders by any law in force before the passing of that Act. The keeping of a *cockpit*

is an indictable offence at common law, (as are the other offences above mentioned,) and a *cockpit* has been held to be a *gaming house* within the 33 Hen. VIII. c. 9, § 11; 1 Russell, 300. *Bawdy-houses* and *gaming-houses* are clearly nuisances in the eye of the law; 1 Russell, 299; *Rex v. Higginson*, 2 Burr. 1232; *Rex v. Rogier*, 2 D. & R. 431; 1 B. & C. 272. *Playhouses* are not in themselves nuisances, though by neglect or mismanagement they may be rendered so; 1 Hawk. P. C. c. 32, § 7. But by 10 Geo. II. c. 28, all places for the exhibition of stage entertainments must be licensed; *Rex v. Handy*, 6 T. R. 286, where it was held that *tumbling* was not a stage entertainment within that Act,) and, by 25 Geo. II. c. 36, all unlicensed places kept for such entertainments are to be deemed disorderly houses. A house kept for the purposes of private dancing has been held to be within that Act; *Clarke v. Searle*, 1 Esp. 25. Though the keeper of it do not take money at the door; *Archer v. Willingine*, 4 Esp. 186. So also has a room in which musical performances were regularly exhibited, though not kept solely for that purpose; *Bellis v. Beal*, 2 Esp. 592. But a room kept by a dancing-master for the use of his scholars, and to which persons are not indiscriminately admitted, is not within the Act; *Bellis v. Burghall*, 2 Esp. 722. Nor does the occasional use of a room in a public-house for dancing on particular festivals, render the owner liable to a penalty; *Shutt v. Lewis*, 5 Esp. 128.

orderly behaviour (*s*). Thus, too, the hospitable laws of Norway punish, in the severest degree, such innkeepers as refuse to furnish accommodations at a just and reasonable price (*t*). 4. By statute 10 and 11 W. III. c. 17, all *lotteries* are declared to be public nuisances, and all grants, patents, or licences for the same to be contrary to law. But, as state-lotteries have, for many years past, been found a ready mode for raising the supply, an act was made 19 Geo. III. c. 21, to license and regulate the keepers of such lottery-offices (17) (18). 5. The making and selling of *fireworks* and *squibs*, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance, by statute 9 and 10 W. III. c. 7, and therefore is punishable by fine (19). And to this head we may refer, though not declared a common nuisance, the making, keeping, or carriage, of too large a quantity of *gunpowder* at one time, or in one place or vehicle; which is prohibited by statute 12 Geo. III. c. 61, under heavy penalties and forfeiture (20). 6. *Eavesdroppers*, or

(*s*) 1 Hawk. P. C. 225.

(*t*) Stiernh. de jure Sueon. l. 2, c. 9.

(17) State lotteries are now utterly abolished by statute 6 Geo. IV.

(18) By the 42 Geo. III. c. 119, all lotteries called *little goes* are declared to be public nuisances, and if any one shall keep an office or place to exercise or expose to be played any such lottery, or any lottery whatever not authorized by parliament, or shall knowingly suffer it to be exercised or played at in his house, he shall forfeit 500*l.*, and be deemed a rogue and a vagabond.

And if any person shall promise to pay any money or goods on any contingency relative to such lottery, or publish any proposal respecting it, he shall forfeit 100*l.*

Justices of the peace, upon complaint, may empower any person by day, and in the night in the presence of a constable, to break open doors and apprehend such offenders, and if any one shall resist, he shall be deemed a rogue and vagabond.—C.H.

(19) And by 3 Geo. IV. c. 126, § 121, if any person or persons shall make, or assist in making, any fire or fires commonly called bonfires, or shall set fire to or wantonly let off, or throw, any squib, rocket, serpent, or other fire whatsoever, within 80 feet of the centre of any turnpike road, the offender shall forfeit for each offence 40*s.*, besides the damages occasioned thereby.

(20) So much of this Act as precludes parties from carrying in any land or water carriage any other lading with gunpowder, is repealed by 54 Geo. III. c. 152.

It would seem, that if persons put on board a ship an unknown article of a combustile and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, they are guilty of a misdemeanor; *Williams v. East India Company*, 3 East, 192, 201.

Building powder-mills, or keeping

such as listen under walls or windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet (*t*): or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour (*u*). 7. Lastly, a *common scold*, *communis rixatrix*, for our law-latin confines it to the feminine gender, is a public nuisance to her neighbourhood. For which offence she may be indicted (*v*); *and, if convicted, shall (*w*) be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or *cucking* stool, which in the Saxon language is said to signify the scolding stool; though now it is frequently corrupted into *ducking* stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment (*x*).

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6. idleness, disorder, vagrancy, and incorrigible roguery; the last a felony;

6. Idleness in any person whatsoever is also a high offence against the public economy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger; the produce of the lands not being more than sufficient, with culture, to maintain the inhabitants; and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court also of Areopagus at Athens punished idleness, and exerted a right of examining every citizen in what manner he spent his time; the intention of which was (*y*), that the Athenians, knowing they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful arts. The civil law expelled all sturdy vagrants from the city (*z*): and, in our own law, all idle persons or vagabonds, whom our ancient statutes describe to be “such as wake on the night, and sleep on the

(*t*) Kitch. of Courts, 40.

(*u*) Ibid; 1 Hawk. P. C. 132.

(*v*) 6 Mod. 213.

(*w*) 1 Hawk. P. C. 198, 200.

(*x*) 3 Inst. 219.

(*y*) Valer. Maxim, l. 2, c. 6.

(*z*) Nov. 80, c. 5.

gunpowder magazines near to a town, seems to be a nuisance at common law, for which an indictment or information

will lie; 2 Stra. 1167; 2 Burn, J., 24th ed. 758; 1 Russell, 297, (*o*).

day, and haunt customable taverns, and alehouses, and routs about; and no man wot from whence they come, ne whether they go;" or such as are more particularly described by statute 17 Geo. II. c. 5, and divided into three classes, *idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues*; all these are offenders against the good order, and blemishes in the government, of any kingdom. They are therefore all punished, by the statute last mentioned; that is to say, idle and disorderly persons with one month's imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding six *months; and incorrigible rogues with the like discipline and confinement, not exceeding two years; the breach and escape from which confinement in one of an inferior class, ranks him among incorrigible rogues; and in a rogue, before incorrigible, makes him a felon, and liable to be transported for seven years. Persons harbouring vagrants are liable to a fine of forty shillings, and to pay all expences brought upon the parish thereby: in the same manner as, by our ancient laws, whoever harboured any stranger for more than two nights, was answerable to the public for any offence that such his inmate might commit (a) (22).

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(a) LL. Edw. c. 27; Bracton, l. 3, tr. 2, c. 10, § 2.

(22) By 5 Geo. IV. c. 83, all former provisions relating to the punishment of idle and disorderly persons, rogues, and vagabonds, are repealed, and are now incorporated in this Act. Idle and disorderly persons are thus described: Persons partially or wholly able to maintain themselves or family by any means, and refusing to do so, whereby they become chargeable to the parish; and persons returning to, and becoming chargeable to the parish, from whence they shall have been removed by order of two justices, unless they produce a certificate of the churchwardens and overseers of some other parish, acknowledging them to be settled in such other parish. Petty chapmen, or wandering pedlars, trading without a licence, common prostitutes loitering in the highways and streets,

and conducting themselves indecently, and common beggars, which parties may be punished by a single justice with one month's imprisonment; a second offence brings them under the denomination of rogues and vagabonds: as also persons pretending to tell fortunes, or using any crafty means to impose on any one, wanderers abroad, lodging in barns or deserted buildings, not having visible means of subsistence, and refusing to give a satisfactory account of themselves. Persons wilfully exposing obscene prints, &c. in any public place, or exposing their persons with intent to insult any female. Persons attempting to obtain alms by exposing their wounds, &c., or going about under false pretences as collectors of alms, deserting their children and wives, whereby they become

7. luxury in diet, a misdemeanor; whether a public evil, quære;

7. Under the head of public economy may also be properly ranked all sumptuary laws against *luxury*, and extravagant expences in dress, diet, and the like: concerning the general utility of which to a state, there is much controversy among the political writers. Baron Montesquieu lays it down (*b*), that luxury is necessary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whose government is compounded of both species, it may still be a dubious question how far private luxury is a public evil; and as such cognizable by public laws. And indeed our legislators have several times changed their sentiments as to this point; for formerly there were a multitude of penal laws existing, to restrain excess in apparel (*c*); chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth,

(*b*) Sp. L. b. 7, c. 2 and 4.

(*c*) 3 Inst. 199.

chargeable to the parish, playing or betting at any games of chance, with any table or instrument of gaming, in any thoroughfare, having any implements of housebreaking in their possession with any felonious intent, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent to commit any felonious act, being found in or upon any dwelling-house, warehouse, outhouse, &c., inclosed yard, garden, &c., for any illegal purpose. Persons suspected as thieves, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, near thereto; or any place leading thereto, with intent to commit felony; and persons taken as idle and disorderly, resisting officers in their apprehension, and being subsequently found guilty of the offence charged against them. These offenders are respectively subject to three months' imprisonment and hard labour, and may be convicted before a single magistrate.

By sect. 5, persons breaking or escaping out of prison before the term for which they have been committed

shall have expired; persons having been previously convicted as rogues and vagabonds, being apprehended for a repetition of the offence; and persons apprehended as rogues and vagabonds, offering resistance, and being afterwards convicted of the offence, are all liable as incorrigible rogues to be committed to the next sessions, and kept to hard labour in the interim; and the sessions may order them to be imprisoned for one year, with hard labour, and whipping in addition, if males.

By sect. 6, any person may apprehend such offenders, and constables neglecting their duty are liable to pecuniary penalties. Sect. 7 authorizes justices to grant warrants for the apprehension of suspected offenders. Sect. 8 directs vagrants to be searched, and their bundles, &c. to be examined. Sect. 9 empowers justices to bind persons to prosecute vagrants at sessions, and the sessions to allow prosecutors their expences. By sect. 13, lodging-houses suspected of harbouring vagrants may be searched, and suspected parties found there may be taken before a magistrate. The fines under this Act go to the crown.

against piked shoes, short doublets, and long coats; all of which were repealed by statute 1 Jac. I. c. 25. But, as to excess in diet, there still remains one ancient statute unrepealed, 10 Edw. III. st. 3, which ordains, that no man shall be served, at dinner or supper, with more than two courses; except upon some great holidays there specified, in which he may be served with three.

8. Next to that of luxury, naturally follows the offence of ^{8. gaming, a misdemeanor;} *gaming*, which is generally introduced to supply or retrieve *the expences occasioned by the former: it being a kind of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft and debauchery among those of a lower class: and, among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honour and virtue, and too often hath ended in self-murder. To restrain this pernicious vice among the inferior sort of people, the statute 33 Hen. VIII. c. 9, was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there specified (*d*), unless in the time of Christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 30 Geo. II. c. 24, inflict pecuniary penalties, as well upon the master of any public-house wherein servants are permitted to game, as upon the servants themselves who are found to be gaming there. But this is not the principal ground of modern complaint: it is the gaming in high life, that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors the ancient Germans; whom Tacitus (*e*) describes to have been bewitched with the spirit of play to a most exorbitant degree. "They addict themselves," says he, "to dice, (which is wonderful,) when sober, and as a serious employment; with such

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(*d*) Logetting in the fields, slide-half-bowl, and coying.
thrift or shove-groat, cloyish cayles,

(*e*) De mor. Germ. c. 24.

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a mad desire of winning or losing, that, when stript of every thing else, they will stake at last their liberty and their very selves. The loser goes into a voluntary slavery, and, though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bad a cause they call the point of honour: **“ea est in re prava pervicacia, ipsi fidem vocant.”* One would almost be tempted to think Tacitus was describing a modern Englishman. When men are thus intoxicated with so frantic a spirit, laws will be of little avail: because the same false sense of honour, that prompts a man to sacrifice himself, will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may consider what penalties they wilfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honour, or, if unsuccessful, have it in their power to be still greater gainers by informing. For by statute 16 Car. II. c. 7, if any person by playing or betting shall lose more than 100*l.* at one time, he shall not be compellable to pay the same; and the winner shall forfeit treble the value, one moiety to the king, the other to the informer (23). The statute 9 Ann. c. 14, enacts, that all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void (24);

(23) If the subject matter of the bet is illegal, the amount seems to be immaterial, for no action will lie upon the wager, however small; *Brown v. Leeson*, 2 H. B. 43; *Squires v. Whitaker*, 3 Camp. 140; *Hunt v. Bell*, 7 J. B. Moore, 212; 1 Bing. 1; *Da Costa v. Jones*, Cowp. 729; *Ditchburn v. Goldsmith*, 4 Camp. 152. Under the 9 Ann. c. 14, if the amount of the bet exceeds 10*l.*, it is immaterial whether the subject matter of it is illegal or not, for the losing 10*l.* by playing or betting is an offence within that statute; Bac. Abr. Gaming, B. A horse race for 50*l.* is legal, and a bet upon it, if not exceeding 10*l.*, may be legal also; *M'Alister v. Haden*, 2 Camp. 430; *Ximenes v. Jaques*, 6 T. R. 499; *Whaley v. Paget*, 2 B. & P.

51; but, if such a bet exceed 10*l.*, it is illegal; *Clayton v. Jennings*, 2 Bla. 706; *Goodburn v. Morleys*, 2 Stra. 1159; *Blaxton v. Pye*, 2 Wils. 309; and where the bet is under 10*l.*, still, if the race is for less than 50*l.*, the bet is illegal; *Johnson v. Bann*, 4 T. R. 1.

(24) The words of the Act are, “that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or

that all mortgages and incumbrances of lands, made upon the same consideration, shall be and enure to the use of the heir of the mortgager: that, if any person at any time or sitting loses 10% at play, he may sue the winner, and recover it back by action of debt at law (25); and, in case the loser

other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall during such play so play or bet, shall be utterly void," &c. *Notes and bills* are void within the statute, even in the hands of innocent indorsees; *Bowyer v. Brampton*, 2 Stra. 1155; *Henderson v. Benson*, 8 Price, 281; *Sigel v. Jebb*, 3 Stark. 1. The court, however, has refused to set aside a warrant of attorney given to the *bonâ fide* obligee of a bond, though founded upon a gaming transaction between the obligor and a third person; *Harrington's case*, 4 Taunt. 683. So, where the indorsee of a bill accepted for a gaming debt sued the drawer, it was held, that though the acceptor was discharged, the drawer, having received legal value from the holder, was liable, for the object of the statute was only to prevent such securities being enforced against the losers, and the case of a drawer of a bill did not come within it; *Edwards v. Dick*, 4 B. & A. 212. So, where a young man gave bills to the amount of a gaming debt, and when they were due, renewed them with the then holder, and for the last bills, when due, confessed a judgment; the court of C. P. would not set aside the judgment, unless he could affect the holder of the bills with notice, but permitted him to try that fact in an issue; *George v. Stanley*, 4 Taunt. 683. It has been said that gaming securities only are

void by this statute, and not gaming contracts; *Robinson v. Bland*, 3 W. Bl. 260; and see *Barjeau v. Walmsley*, 2 Stra. 1249; *Bulling v. Frost*, 1 Esp. 235; *Thistlewood v. Cracroft*, 1 M. & S. 500; *Wettenhall v. Wood*, 1 Esp. 18; *Vaughan v. Whitcomb*, 2 N. R. 413; but see *Young v. Moore*, 2 Wils. 67, from which it would seem that all such contracts are void. A horse-race, *Goodburn v. Manley*, 2 Stra. 1159; *Blaxton v. Pye*, 1 Wils. 309; a foot-race, *Brown v. Berkeley*, Cowp. 281; *Lynall v. Longbottom*, 2 Wils. 36; a cockfight, *Squires v. Whisken*, 3 Camp. 140; and cricket, *Jeffreys v. Walter*, 1 Wils. 220, are all of them games within the 9 Ann. c. 14; and, though playing at billiards has been held not to be gaming within the 30 Geo. II. c. 24, "An Act for preventing gaming in public-houses by journeymen, &c." yet it has been doubted whether it is not so within the old Act of 33 H. VIII. c. 9.

(25) If company never part, though dinner intervenes, the loss is at one sitting; *Bones v. Booth*, 2 Bla. 1226. There two persons played at all fours at two guineas a game, from Monday evening to Tuesday evening, without any interruption, except for an hour or two at dinner, and one of them won a balance of seventeen guineas. The court said, the statute, with respect to the party losing, is remedial, not penal. He is to recover back his money, and to that end sect. 3 allows a bill in equity for a discovery, which plainly shews it was not considered as a penal statute. Had this been a proceeding on that branch of the statute which inflicts pillory, &c., it had been otherwise. The statute makes the winning

does not, any other person may sue the winner for treble the sum so lost (26); and the plaintiff may by bill in equity examine the defendant himself upon oath; and that in any of these suits no privilege of parliament shall be allowed (27).

of 10*l.* at one time or sitting a nullity, and therefore gives the loser an action to recover back what still properly continues to be his own money. To lose 10*l.* at one time, is to lose it by a single stake or bet; to lose it at one sitting, is to lose it in a course of play where the company never part, though the person may not be actually gaming the whole time. And see 1 Russell, 408. In an action for penalties under the statute, a bill of discovery, filed for the purpose of a former action for money lost, may be read in evidence; *Thistlewood v. Cracroft*, 6 Taunt. 141, 1 Marsh, 497.

(26) If the loser does not recover back the money lost within three months, any other person may recover the same, and treble the amount besides, with costs, one-half for himself, the other half for the poor. The plaintiff in an action on this statute, recovered treble the value of money lost at play; the loser not having sued within the time prescribed by the statute, a writ of error was brought by the defendant, and judgment was affirmed, without costs. Held, that the poor of the parish where the offence was committed were entitled to one moiety of the sum recovered, without deducting costs; *Willan v. Taylor*, 7 B. & C. 111. If money be lent to game with, it may be recovered back as money lent, though the bond, note, or other security given for it is void; 2 Burr. 1077.

A bill in equity may be filed to discover the consideration of a promissory note or other security alleged to be given for money lost at play, and to have it delivered up; *Andrews v. Berry*, 3 Anst. 634.

In an action against A, to recover back money lost, A may plead that it

was not won by him alone, but jointly with B; 7 T. R. 257.

(27) The right to sue given by the statute, is a vested interest; and, in case of bankruptcy, passes to the assignees; *Brandon v. Sands*, 2 Ves. J. 514; *Brandon v. Pate*, 2 H. B. 308; *Carter v. Abbott*, 2 D. & R. 575; 1 B. & C. 444. In the latter case, the assignee of a bankrupt brought an action on this statute to recover money lost by the bankrupt to the defendant at the game of *Rouge et Noir*. To prove the loss of the money, the bankrupt, who had obtained his certificate, was called as a witness, and in order to render himself competent, he released the assignee of all claim upon the surplus fund, if any; all the creditors who had proved released the bankrupt from all future claims; and the assignee, who was not a creditor, executed a like release to the bankrupt. And it was held, that the assignee's right of action was not destroyed by the release he had executed, inasmuch as it only extended to the bankrupt's future estate.

The action must be brought within the time (three months) limited by the statute. In trover for a horse lost upon a gaming contract, the action was commenced after three months, and it was held that the plaintiff could not recover, because of the general invalidity of the contract. And Heath, J., said, there was no substantive clause in the Act which avoided the contract; it only rendered it liable to be defeated *sub modo*, for which purpose the plaintiff must bring his action within the limited time; Evans's note to 9 Ann. c. 14, in his Collection of the Statutes.

The action must be founded on the statute. Money fairly lost at play cannot be recovered back in an action of

The statute further enacts, that if any person by cheating at play shall win any money or valuable thing, or shall, at any one time or sitting, win more than 10*l*. he may be indicted thereupon, and shall forfeit five times the value to any person who will sue for it; and, in case of cheating, shall be deemed infamous, and suffer such corporal punishment as in case of wilful perjury. By several statutes of the reign of king George II. (*f*), all private lotteries by tickets, cards, or dice, and particularly the games of faro, basset, ace of hearts, hazard, passage, roly polly, and all other games with dice, except backgammon, are prohibited under a penalty of 200*l*. for him that shall erect such lotteries, and 50*l*. a time for the players. Public *lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes (*g*) under heavy pecuniary penalties. But particular descriptions will ever be lame and deficient, unless all games of mere

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(*f*) 12 Geo. II. c. 28; 13 Geo. II. c. 19; 18 Geo. II. c. 34.

(*g*) 10 & 11 W. III. c. 17; 9 Ann. c. 6, § 56; 10 Ann. c. 26, § 109;

8 Geo. I. c. 2, § 36, 37; 9 Geo. I. c. 19, § 4, 5; 6 Geo. II. c. 35, § 29, 30.

debt for money had and received not founded on the statute; the plaintiff must declare specifically on the statute; *Thistlewood v. Cracroft*, 1 M. & S. 500. To an action founded on the statute, the defendant may plead in abatement, that the money was due from others not named, as well as from himself; *Bristow v. James*, 7 T. R. 257. But a stakeholder upon an illegal wager, as a horse-race for 20*l*., is liable to a common law action for money had and received, if the money be demanded before he pays it over to the winner; *Robinson v. Mearns*, 6 D. & R. 26. And see *Thornton v. Thackray*, 2 Younge and Jervis, 156.

If the loser does not sue within three months, any other person may. But a common informer cannot sue for a less penalty, as for the single value of the money lost, than the statute

gives, which is the treble value; and if he does, and recovers a verdict, the judgment may be arrested; *Cunningham v. Bennett*, Bull, N. P. 196.

By § 8 of the Act, assaulting, or challenging, any person on account of money won at play, renders the offender liable to forfeit all his goods, and to be imprisoned for two years. On an indictment for this offence, if the jury find that the assault was on account of money won at play, the case is within the statute, though the assault was committed at a subsequent time and place, and after abusive language between the parties in respect of such money won; *Rex v. Hill Darley*, 4 East, 174. In an earlier case, *Rex v. Randal*, 1 East, P. C. 423, Buller, J., was of opinion, that judgment could be given only in cases where the assault was committed at the time of the play.

chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. The statute 13 Geo. II. c. 19, to prevent the multiplicity of horse-races, another fund of gaming, directs that no plates or matches under 50*l.* value shall be run, upon penalty of 200*l.* to be paid by the owner of each horse running, and 100*l.* by such as advertise the plate (28). By statute 18 Geo. II. c. 34, the statute 9 Ann. is further enforced, and some deficiencies supplied: the forfeitures of that act may now be recovered in a court of equity; and, moreover, if any man be convicted upon information or indictment of winning or losing at play or by betting at any one time 10*l.* or 20*l.* within twenty-four hours, he shall be fined five times the sum, for the benefit of the poor of the parish. Thus careful has the legislature been to prevent this destructive vice: which may show that our laws against gaming are not so deficient, as our-

(28) Newmarket and Black Hambleton are excepted, where a race may be run for any sum or stake less than fifty pounds. But though such horse-races are lawful, yet it has been determined, that they are games within the statute of 9 Ann. c. 14, and that of consequence wagers above 10*l.* upon a lawful horse-race, are illegal; 2 Bl. Rep. 706. A foot-race, and a race against time, have also been held to be games within the statute of gaming; 2 Wils. 36. So a wager to travel a certain distance within a certain time, with a post chaise and a pair of horses, has been considered of the same nature; 6 T. R. 499. A wager for less than 10*l.* upon an illegal horse-race, is also void and illegal; 4 T. R. 1. Though the owners of horses may run them for a stake of 50*l.* or more at a proper place for a horse-race, yet it has been held if they run them upon the highway, the wager is illegal; 2 B. & P. 51.

Wagers in general, by the common law, were lawful contracts, and all wagers may still be recovered in a court of justice, which are not made upon

games, or which are not such as are likely to disturb the public peace, or to encourage immorality, or such as will probably affect the interests, characters, and feelings of persons not parties to the wager, or such as are contrary to sound policy, or the general interests of the community. See 3 T. R. 693, where the legality of wagers is fully discussed.

Where a person had given 100*l.* upon condition of receiving 300*l.* if peace was not concluded with France within a certain time, and he afterwards brought his action to recover the 300*l.*, it was held, the wager was void, as being inconsistent with general policy, but he was allowed to recover back the 100*l.* which he had paid, under a count for so much money had and received by the defendant to his use; 7 T. R. 505. So also, a person was permitted to recover back his share of a wager against a stakeholder upon a boxing match, 5 T. R. 405, the court not considering the conduct of the plaintiff in these instances so criminal as to deprive him of the benefit of their assistance. See 2 B. & P. 467—CH.

selves and our magistrates in putting those laws in execution (29).

9. Lastly, there is another offence, constituted by a variety of acts of parliament; which are so numerous and so confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offence which the sportsmen of England seem to think of the highest importance; and a matter, perhaps the only one, of general and national concern; associations having been formed all over the kingdom to prevent its destructive progress. I mean the offence of destroying such beasts and fowls, as are ranked under the denomination of *game*; which, we may remember, was formerly observed (*h*), upon the old principles of the forest law, *to be a trespass and offence in all persons alike, who have not authority from the crown to kill game, which is royal property, by the grant of either a free warren, or at least a manor of their own (30). But the laws, called the game

9. destroying game, a misdemeanor;

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(*h*) See vol. II. page 417, &c.

(29) Section 5 of the 12 Geo. II. c. 28, "An Act for the more effectual preventing of excessive and *deceitful* gaming," requires *reasonable* notice of appeal to the sessions against a conviction, but the notice may be by parol, or in writing: held, that its reasonableness in point of time, is for the justices at sessions to determine; *Rex v. Surrey* (Justices), 1 D. & R. 160; 5 B. & A. 539. See the other statutes upon this subject, 13 Geo. II. c. 19; 18 Geo. II. c. 34; 25 Geo. II. c. 36; 30 Geo. II. c. 24; 27 Geo. III. c. 1; 34 Geo. III. c. 46; 42 Geo. III. c. 119. The 27 Geo. III. c. 1, which takes away the summary jurisdiction of magistrates over offences concerning lotteries, only extends to *state* lotteries, (now abolished, see *ante* 168, n. (17)); and does not repeal their power over games of chance or lotteries prohibited by the 12 Geo. II. c. 28; *Rex v. Liston*, 5 T. R. 338. Keeping and maintaining a common gaming-house, and for lucre and gain causing and procuring

idle and evil-disposed persons to come there to play together at *Rouge et Noir*, and permitting such persons to play at such game for large sums of money, is an offence indictable at common law; *Rex v. Rogier*, 2 D. & R. 431; 1 B. & C. 272. An indictment may be sustained merely charging a person with keeping a common gaming-house. *Id.* *Ibid.*

Prisoners found gambling in the King's Bench prison, are liable to be punished at the discretion of the court. *In re Stephens*, 3 D. & R. 599; 2 B. & C. 344.

(30) *Grouse* are not birds of *free warren*, and trespass for breaking and entering plaintiff's free warren, and killing grouse there, cannot be maintained; *Duke of Devonshire v. Lodge*, 9 D. & R. 875; 7 B. & C. 36. Grouse, however, are mentioned as *game* in various Acts of Parliament, and in the recent Act of 1 & 2 Wm. IV. c. 32, "An Act to amend the laws in England relating to game," by which all former Acts upon

laws, have also inflicted additional punishments, chiefly pecuniary, on persons guilty of this general offence, unless they be people of such rank or fortune as is therein particularly specified. All persons therefore, of what property or distinction soever, that kill game out of their own territories, or even upon their own estates, without the king's licence expressed by the grant of a franchise, are guilty of the first original offence, of encroaching on the royal prerogative. And those indigent persons who do so, without having such rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations also, created by the statutes for preserving the game: which aggravations are so severely punished, and those punishments so implacably inflicted, that the offence against the king is seldom thought of, provided the miserable delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the present head, because the only rational footing, upon which we can consider it as a crime, is, that in low and indigent persons it promotes idleness, and takes them away from their proper employments and callings: which is an offence against the public police and economy of the commonwealth (31).

the subject are repealed, are expressly included in sect. 2, which defines what shall be deemed game. See that Act set out *post* n. (32). An action on the case will not lie for disturbing a rookery: on the ground that rooks are a species of birds, *feræ naturæ*, of a destructive nature, not known as an article of food, and not protected by any statute, and therefore that a person cannot have any property in them, or establish any legal right to cause them to resort to his trees; *Hannam v. Mockett*, 4 D. & R. 518; 2 B. & C. 934. The fact of rooks being birds *feræ naturæ*, and of a destructive nature, applies equally to game, and would, upon principle, furnish equally good reasons for withholding from the latter the protection of the law; and the circumstance of

game being known as an article of food, does not seem to afford any solid distinction, for it is notorious that rooks, at certain seasons of the year, are extensively used for food.

(31) The present prevailing offence connected with *game*, is that commonly known by the name of *poaching*, or the going out armed in the night time, for the purpose of destroying and taking game. This offence, a misdemeanor, but punishable as a *felony*, is necessarily unnoticed by the learned commentator, it having first attracted the particular attention of the legislature in the year 1817, when an Act was passed for its suppression. *That Act (57 Geo. III. c. 90) recited, "that idle and disorderly persons frequently went armed in the night time, for the purpose of pro-

* It had been alluded to in a former statute, 39 and 40 Geo. III. c. 50, but only as an Act of Vagrancy.

The statutes for preserving the game are many and various, and not a little obscure and intricate; it being re-

tecting themselves, and aiding and abetting and assisting each other in the illegal destruction of game and rabbits, and that such practices were found by experience to lead to the commission of felonies and murders;" and then proceeded to make certain enactments "for the more effectual suppression thereof." Nothing could be more true than the recital of that statute; nothing more praiseworthy or more desirable than its object: but nothing, it is lamentable to add, more ineffectual than its operation. After a full and active trial of eleven years, during which all the evils mentioned in its recital progressively increased, that statute has been repealed, and a new one has been passed (9 Geo. IV. c. 69), which has, unhappily, effected but little improvement. In order rightly to understand the cases that have been decided upon this important subject, and correctly to judge of their bearing upon the law as it now stands, it will be necessary to set out both the Acts of Parliament somewhat at length.

The 57 Geo. III. c. 90, § 1, enacted, that if any person or persons, having entered into any forest, chase, park, wood, plantation, close, or other open or enclosed ground, with intent illegally to destroy, take, or kill game or rabbits, or with intent to aid, abet and assist, any person or persons illegally to destroy, &c., game, &c., should be found at night, that is to say, between the hours of six in the evening and seven in the morning, from the 1st of October to the 1st of February, between seven in the evening and five in the morning, from the 1st of February to the 1st of April, and between nine in the evening and four in the morning for the remainder of the year, armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, every such person so offending, being thereof lawfully convicted, should be

adjudged guilty of a misdemeanor, and should be sentenced to transportation for seven years, or should receive such other punishment as might by law be inflicted on persons guilty of misdemeanor, and as the court before which such offenders might be tried and convicted should adjudge.

Sect. 2 enacted, that it should and might be lawful to and for the ranger and rangers, owner and owners, occupier and occupiers of any such forest, &c., and for his, her, or their keeper and keepers, servant and servants, and for any other person or persons, to seize and apprehend, or assist in seizing or apprehending, such offender or offenders, and to convey and deliver such offender or offenders into the custody of a peace-officer, who was thereby authorized and directed to convey such offender or offenders before a justice of the peace; or, in case such offender or offenders should not be so apprehended, then it should and might be lawful for such justice, on information on the oath of any credible witness, to issue his warrant for their apprehension; with power to the justice to admit the persons charged to bail, and in default of bail, to commit them to gaol until the next sessions or assizes.

Sect. 3 enacted, that if any person or persons should unlawfully enter into or be found in any forest, &c., at night, according to the provisions of the Act, with respect to what should be deemed night, for the purposes thereof, having any net, engine, or other instrument, for the purpose and with intent to destroy, &c., or should wilfully destroy, &c., game, it should and might be lawful to and for the ranger and rangers, owner and owners, occupier and occupiers of any such forest, &c., and for his, her, or their keeper or keepers, servant and servants, and for any other person or persons, to seize and apprehend, or assist in seizing or apprehend-

marked (i), that in one statute only, 5 Ann. c. 14, there is false grammar in no fewer than six places, besides other mis-

(i) Burn's Justice, tit. Game, § 3.

hending such offender or offenders, and to convey and deliver them into the custody of a peace-officer, who was thereby authorized and directed to convey them before a justice of the peace, to be dealt with according to law.

The 9 Geo. IV. c. 69, § 1, after reciting the 57 Geo. III. c. 90, and that "the practice of going out by night for the purpose of destroying game, has nevertheless very much increased of late years, and has in very many instances led to the commission of murder, and of other grievous offences, and that it is expedient to repeal the said recited Act, and to make more effectual provisions than now by law exist for repressing such practice," repeals the former Act, and enacts, that if any person shall, by night, unlawfully take or destroy any game or rabbits in any land, whether open or enclosed, or shall by night unlawfully enter or be in any land, whether open or enclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices, be committed for the first offence for any period not exceeding three months, with hard labour; and, at the expiration of such period, shall find sureties by recognizance, himself in 10*l.*, and two sureties in 5*l.* each, or one surety in 10*l.*, for his not so offending again for one year; and, in case of not finding such sureties, shall be further imprisoned and kept to hard labour for six months, unless such sureties are sooner found; and, in case such person shall so offend a second time, and shall be thereof convicted before two justices, he shall be committed for any period not exceeding six months, with hard labour; and, at the expiration of such period, shall find sureties by recognizance, as afore-

said, himself in 20*l.*, and two sureties in 10*l.* each, or one surety in 20*l.*, for his not so offending again for two years; and, in case of not finding such sureties, shall be further imprisoned and kept to hard labour for one year, unless such sureties are sooner found; and, in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be transported for seven years, or to be imprisoned and kept to hard labour for any term not exceeding two years.

Sect. 2 enacts, that when any person shall be found upon any land committing any offence hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him into the custody of a peace-officer, in order to his being conveyed before two justices; and, in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported for seven years, or to be imprisoned and kept to hard labour for any term not exceeding two years.

takes: the occasion of which, or what denomination of persons were probably the penners of these statutes, I shall not

Sect. 3 enacts, that where any person shall be charged on the oath of a credible witness, before any justice, with any offence punishable upon summary conviction by virtue of this Act, the justice may issue his warrant for apprehending such person, and bringing him before two justices, to be dealt with according to law.

Sect. 4 enacts, that the prosecution for every offence punishable upon summary conviction by virtue of this Act, shall be commenced within six months after the commission of the offence; and the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this Act, shall be commenced within twelve months after the commission of the offence.

Sect. 5 gives a form of conviction.

Sect. 6 gives an appeal to the Quarter Sessions.

Sect. 7 takes away the certiorari.

Sect. 8 directs convictions to be returned to the Quarter Sessions, and registered, and makes them evidence in prosecutions under the Act.

Sect. 9 enacts, that if any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or enclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported for any term not exceeding fourteen, nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years.

Sect. 12 enacts, that for the purposes of this Act, the night shall be considered, and is hereby declared to commence, at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.

Sect. 13 enacts, that for the purposes of this Act the word *game* shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

The two Acts of parliament being thus at once brought under review, the student will have little difficulty in marking the distinctions between them. One great evil attending the old Act, was the indiscriminate power of inflicting so severe a punishment as transportation for seven years, or long imprisonment (to which, since the 3 Geo. IV. c. 114, hard labour might be added), for every offence, whether the first or not, and whether accompanied by circumstances of aggravation or not. Another, and still greater evil, was the vesting such a power in the courts of quarter sessions, constituted as they are of individuals who, however meritorious in other respects, are the very last persons qualified to administer the law in such cases with proper impartiality, temper, and mercy. It is notorious that those courts have frequently visited the poacher with sentence of transportation at the same sessions where they have dismissed the servant who has robbed his employer, or the nightly marauder who has broken open and plundered a hen-house, with a few months' imprisonment; and that the sentences passed by the judges of assize upon offenders against the game laws, have been upon an average about one-fourth in degree of severity in comparison with those passed upon similar offenders by the courts of quarter sessions. By the new Act both these

at present inquire (32). It is in general sufficient to observe, that the *qualifications* for killing game, as they are usually

evils are remedied. The first section frames a scale of punishment proportioned to the number of successive offences; and the ninth, which imposes the punishment of transportation upon first offences of a particular description, vests the power of trying those offences in the justices of gaol delivery exclusively. The new Act, however, is not free from imperfections and obscurities. Looking at the language of the first section, it would *seem*, that if *one* or *two* persons should be proved to have entered into any land, by night, armed with any gun, &c., for the purpose of taking and destroying *rabbits only*, they would not be liable within that section. Again, it seems by no means clear, that offences committed by three or more persons together, as described in the ninth section, would not be punishable under the first section. The definition of *night*, given in the twelfth section, is perfectly different from that embodied in the first section of the old statute, and appears unfortunately to be even less distinct and perspicuous. No provision whatever is made for the punishment of offenders returning from transportation; it is presumed, however, that such offenders will be capital felons, and punishable as such under the general provisions of 5 Geo. IV. c. 84, for which *vide ante*, 132, notes (12) (13). The following decisions upon the old statute will, it is conceived, be still found useful, as applicable to the new Act.

An indictment, charging a party with having entered into a forest, chase, &c., with intent to destroy game, and being there found armed, in the night, must, in some way or other, particularize the place, as by setting forth the name, ownership, occupation, or abutments; for the offence is substantially local, and the defendant is entitled to know to what specific place the evi-

dence is to be directed; *Rex v. Ridley*, R. & R. C. C. 515.

If several persons are out with the intent to kill game, and only one of them is armed, the rest who are unarmed, are liable to be convicted; *Rex v. Smith*, Id. 368.

It is no answer to a charge of being found armed in the night in a wood with intent to kill game, that the prisoners put down their arms, and left them, before they were seen, if it was perceived (by the flash of a gun, or otherwise) that some, or one of them, were armed, before they were seen; *Rex v. Nash*, Id. 386.

If several go into a close in the night to kill game, and one has arms without the knowledge of the others, the other persons, who are unarmed, are not liable to be convicted; *Rex v. Southern*, Id. 444.

What is, or is not, a *bludgeon*, or an *offensive weapon*, within the meaning of the legislature, has frequently been the subject of argument upon trials of prosecutions under the former Act of parliament. The new Act contains nothing tending to set that question at rest, and there are no decisions to be found upon the point, at least with reference to these particular statutes. The editor once conducted a prosecution under 9 Geo. IV. c. 69, § 9, in the course of which it appeared that the defendants were armed with *sticks*, about four feet in length, and about the size of a man's thumb in circumference. It was objected that these were not either bludgeons or offensive weapons within the fair meaning of the Act of parliament, and the learned judge, Burrough, J., expressed himself of that opinion, and *upon that ground* directed the jury to acquit the defendants, which they did accordingly; *Rex v. Edwards* and others, Essex Special Gaol Delivery, December 1828, Ed.

called, or more properly the *exemptions* from the penalties inflicted by the statute law, are, 1. The having a freehold estate of 100*l.* **per annum*; there being fifty times the pro-

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MS. *In Rex v. Johnson*, R. & R. C. C. 492, a prosecution on the 7 Geo. II. c. 21, for assaulting the prosecutor with an offensive weapon, with intent to steal his money, it was held, that a *stick* was an offensive weapon within the meaning of that statute, though not of extraordinary size, and though it might in general be used as a *walking stick*. And see *Fletcher's case*, 1 Leach, 23; 2 Stra. 1166; *Hutchinson's case*, 1 Leach, 342; 1 Russell, 167, 882.

(32) By the 1 & 2 W. IV. c. 32, § 1, the previously existing statutes relating to game (not, however, including the 9 Geo. IV. c. 69) are repealed.

Sect. 2 defines what shall be deemed game.

Sect. 3 particularises the days and seasons during which game shall not be killed; and imposes a penalty on persons laying poison to kill game.

Sect. 4 makes the possession of game illegal, after ten days in licensed dealers, and forty days in other persons, after the expiration of the season.

By sect. 5 the Act shall not affect the existing laws respecting game certificates.

By sect. 6, every certificated person may kill game, subject to the law of trespass.

By sect. 7, under existing leases, the landlord shall have the game, except in certain specified cases.

By sect. 8, the Act shall not affect any existing or future agreements respecting game, nor any rights of manor, forest, chase, or warren.

By sect. 9, the Act shall not affect any of his Majesty's forest rights, &c.

By sect. 10, the Act shall not affect any cattle-gates or rights of common; and lords of manors shall have the game on the wastes.

By sect. 11, landlords having the game may authorize others to kill it.

By sect. 12, where landlords have the right to the game, in exclusion of occupiers, the latter shall be liable to a penalty for killing it.

By sect. 13, lords of manors may appoint game-keepers, and authorize them to seize dogs, nets, &c. used by uncertificated persons.

By sect. 14, lords of manors may grant deputations.

Sect. 15, lays down regulations respecting appointments of game-keepers in Wales.

By sect. 16, all appointments of game-keepers shall be registered with the clerk of the peace.

By sect. 17, certificated persons may sell game to licensed dealers.

By sect. 18, justices shall hold special sessions yearly for granting licences to persons to deal in game, who shall put up a board specifying that they are licensed.

By sect. 19, persons licensed to deal in game shall annually take out a certificate with a 2*l.* duty.

By sect. 20, tax collectors shall yearly make out lists of persons who have obtained licences to deal in game.

By sect. 21, partners shall not be obliged to take out more than one licence yearly.

Sect. 22, declares when licences shall become void.

Sect. 23, imposes a cumulative penalty upon persons killing game without a certificate.

Sect. 24, imposes a penalty upon persons destroying or taking the eggs of game.

Sect. 25, imposes penalties upon persons selling game without a licence, and upon certificated persons selling to unlicensed persons.

Sect. 26, excepts innkeepers.

Sect. 27, imposes a penalty upon persons buying game except from licensed dealers.

perty required to enable a man to kill a partridge, as to vote for a knight of the shire: 2. A leasehold, for ninety-nine years of 150*l.* *per annum*: 3. Being the son and heir

Sect. 28, imposes penalties upon licensed dealers buying game from uncertificated persons, or otherwise offending.

Sect. 29, excepts buying and selling game by servants of licensed dealers.

Sect. 30, imposes a penalty upon persons trespassing in the day-time upon lands in search of game; and provides, that where the occupier of land, not being entitled to the game, allows any person to kill it, the party entitled to the game may enforce the penalty.

By sect. 31, trespassers in search of game may be required to quit the land, and to tell their names and abodes; and in case of refusal, may be arrested.

Sect. 32, imposes a penalty upon persons found armed using violence, &c.

Sect. 33, imposes a penalty upon persons trespassing in the day-time in his Majesty's forests.

Sect. 34, defines what shall be deemed day-time.

By sect. 35, the provisions as to trespassers shall not apply to persons hunting, &c.

By sect. 36, game may be taken from trespassers not delivering up the same when demanded.

Sect. 37, prescribes the application of penalties; and

Sect. 38, the time for payment thereof, and the scale of imprisonment for non-payment.

Sect. 39, gives a form of conviction.

Sect. 40, gives a power to summon witnesses, and imposes a penalty for disobedience of summonses, &c.

Sect. 41, fixes the time for proceedings, and the mode of enforcing the appearance of offenders.

Sect. 42, provides that prosecutors shall not be required to prove a negative.

Sect. 43, directs that convictions shall be returned to the sessions.

Sect. 44, gives an appeal.

Sect. 45, takes away the certiorari.

Sect. 46, provides that the Act shall not preclude actions for trespass, but prohibits double proceedings for the same trespass.

Sect. 47, regulates proceedings against persons acting under the Act.

Sect. 48, confines the operation of the Act to England and Wales.

Schedules (A) and (B) give forms of licences and certificates.

Having thus taken an abridged view of the provisions of the new law, it may be useful, briefly to notice some of the leading decisions upon the former game laws, with respect to, first, the property in game; secondly, the qualification to kill game; thirdly, the penalties for killing game; fourthly, informations and convictions under the game laws; and fifthly, gamekeepers.

First. One who finds game on his own land, has no right to pursue and kill it on the land of another; *Dean v. Clayton*, 7 Taunt. 489. And discharging a gun from the outside of another's field into it, so that the shot must strike the soil, is breaking and entering the field; *Pickering v. Rudd*, 4 Camp. 220; 1 Stark. 58. The plaintiff's dogs having hunted and caught, on the defendant's land, a hare, started on the land of a third person, the property is thereby vested in the plaintiff, who may maintain trespass against the defendant for afterwards taking away the hare. And so it would be, though the hare, being quite spent, had been caught up by a labourer of the defendant for the benefit of the hunters; *Churchward v. Studdy*, 14 East, 249.

A clause in a deed dated 1655, (before shooting was in use,) reserving a right of hawking and hunting, does not include the liberty of shooting feathered game with a gun; *Moore v.*

apparent of an esquire (a very loose and vague description) or person of superior degree: 4. Being the owner, or keeper, of a forest, park, chase, or warren. For unqualified

Earl of Plymouth, 7 Taunt. 614; 1 J. B. Moore, 346.

Secondly. An estate of the value of 150*l.* a year, holden by the defendant in his own right, under a lease for ninety-nine years to trustees, if the defendant and others should so long live, is a sufficient qualification to kill game, within 22 & 23 C. II. c. 25, § 3; *Earl Ferrers v. Hinton*, 8 T. R. 506.

A life estate of less than 150*l.* a year does not give a qualification to kill game; *Lowndes v. Lewis*, Cald. 188.

A church living is a life estate; *Id.* *Ibid.*

On a question of a defendant's qualification to kill game, convicting magistrates may form their opinion that he is not qualified, from the fact of his having previously sworn under the Income Act to an estate under 100*l.* a year; *Rex v. Clarke*, 8 T. R. 220.

An equitable estate gives a qualification; but it must be of the necessary value, clear of all mortgages or incumbrances created either by the owner, or by those under whom he claims; *Wetherhall v. Hull*, Cald. 230, 8 T. R. 221, n.

In an action for penalties against an unqualified person for killing game, slight proof of qualification is sufficient, unless rebutted by other evidence; *Smyth v. Jefferies*, 9 Price, 257.

A Scotch diploma, conferring the degree of M.D., does not give a qualification to kill game, within 22 & 23 C. II. c. 25; *Jones v. Smart*, 1 T. R. 44.

Esquires and persons of higher degree are not expressly exempted by 22 & 23 C. II. c. 25, from penalties on breach of the game laws, but their sons and heirs apparent are; *Rex v. Usley*, Cald. 389.

A son can only be qualified while his father lives, the words of the Act being *sons and heirs apparent*; he ceases to

be heir apparent when his father dies, and therefore that species of qualification is then at an end; *Christian's* G. L. 130.

A commission of captain of volunteers, signed by the lord lieutenant of the county, does not confer the degree of esquire, nor is the captain's son thereby qualified to kill game; *Talbot v. Eagle*, 1 Taunt. 510. Whether an apothecary is an inferior tradesman within 4 & 5 W. & M. c. 23, § 10, *quære*; *Buxton v. Mingay*, 2 Wils. 70.

The proof of qualification lies upon the defendant, both on an information, and in an action; *Rex v. Turner*, 5 M. & S. 206; 1 R. & M. 159.

Thirdly. In debt for penalties under the game laws, the plaintiff can recover only one penalty for the same act; *Molton v. Chuseley*, 1 Esp. 123.

If an unqualified person kills game by accident, he cannot take it away, or he is subject to the penalty; *Id.* *Ibid.*

The penalty for not producing a licence when lawfully required, does not attach on a mere refusal to produce it, unless the party refuses, on request, to tell his christian and surname, and his place of residence; *Molton v. Rogers*, 4 Esp. 215.

Possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, is not a possession incurring a penalty; *Warneford v. Kendall*, 10 East, 19.

An unqualified person coursing a hare with the qualified owner of greyhounds, is not liable to the penalty of 5 Ann. c. 14; *Lewis v. Taylor*, 16 East, 49.

An unqualified and unlicensed person may join the sport with a qualified person, if he is not himself a principal, and using his own dogs; *Molton v. Rogers*, 4 Esp. 217.

persons transgressing these laws, by killing game, keeping engines for that purpose, or even having game in their custody, or for persons, however qualified, that kill game, or

A servant who justifies killing game as such, must give strict evidence that his master is a qualified person; *Clarke v. Broughton*, 3 Camp. 328.

A servant in the presence and by the command of his master, who is qualified, may kill game; *Turner v. Lord Coningsby*, Bull, N. P. 196.

If a qualified person sends out his huntsman with his hounds, and a hare is killed, which the huntsman takes up, no penalty is incurred; *Hawke v. Jackson*, 2 Selw. N. P. 885.

A groom attending his qualified master while using dogs for killing game, and pursuing it by his master's command, is not liable to any penalty; *Rex v. Taylor*, 15 East, 460.

The servant of a qualified person assisted his master in setting a trap on his land for taking rabbits and vermin, and his master ordered him, if a hare should be caught, to bring it to him; a hare was caught in the absence of the master, and was killed and carried to him by the servant. Held that the servant was not liable to penalties for using a snare to destroy game, or for having game in his possession; *Walker v. Mills*, 4 J. B. Moore, 343; 3 B. & B. 1.

But where a servant, in the presence and by the command of his master, who was a qualified person, went out with a gun in pursuit of, and actually shot and killed game, he was held liable to a penalty; *Rex v. Sylvester*, 4 M. & R. 5; 9 B. & C. 61.

Merely keeping a sporting dog, is not evidence of keeping it for the purpose of destroying game, without proof of its having been used for that purpose; *Read v. Phelps*, 15 East, 271; 2 Selw. N. P. 883, n. And see *Heyward v. Horner*, 5 B. & A. 317; *Briarly v. Althorpe*, Id. 320, n.

On an information charging the defendant with keeping and using a dog, and a gun, on the same day, he can

only be convicted in one penalty; *Rex v. Lovat*, 7 T. R. 152.

But a defendant may be convicted of several offences in the same conviction; *Rex v. Swallow*, 8 T. R. 284.

Two persons cannot be convicted in separate penalties under 5 Ann. c. 14, for using a greyhound to destroy game; *Rex v. Bleasdale*, 4 T. R. 809.

In an action for penalties for using a gun to destroy game, it is sufficient to prove that the defendant was beating about for game, and pointed his gun, though he did not fire at any game; *Hebden v. Hentey*, 1 Chit. Rep. 607; and see *Rex v. Davis*, 6 T. R. 177; *Rex v. Gardner*, Andr. 255; 2 Stra. 1098; 2 Sess. Ca. 385; *Rex v. King*, 1 Sess. Ca. 88.

Fourthly. A conviction on 5 Ann. c. 14, for keeping, or using a dog, or gun, to destroy game, must be made within three months after the offence committed; *Rex v. Tolley*, 3 East. 476.

And the word *months* has been held to mean *lunar months*; *Rex v. Bellamy*, 2 D. & R. 727; 1 B. & C. 500.

A conviction must particularly and negatively specify, that the defendant had not any of the qualifications required by the statute; *Rex v. Jarvis*, 1 Burr. 148; 1 East, 443, n.; *Rex v. Wheatman*, 1 Doug. 345.

But the evidence need not negative every specific qualification; *Rex v. Crowther*, 1 T. R. 125.

Evidence in a conviction on 5 Ann. c. 14, that "the defendant kept and used a gun to kill and destroy the game" has been held sufficient; *Rex v. Thompson*, 2 T. R. 18.

A conviction for killing game, not being qualified, to the effect of the form given by 31 Geo. III. c. 21, § 4, is good; *Rex v. Jefferies*, Nolan, 106.

A conviction alleging that the defendant had not "lands or tenements, or any other estate of inheritance of

have it in possession, at unseasonable times of the year, or unseasonable hours of the day or night, on Sundays or on Christmas-day, there are various penalties assigned, corporal

the clear yearly value of 100*l.*, or for term of life, &c., or was in any other manner qualified," &c., is not sufficient, without also specifically negating that he had an estate of inheritance of the clear yearly value of 100*l.* in right of his wife; but it is sufficient to state that he kept and used a dog called a lurcher, to kill and destroy the game; *Rex v. Earnshaw*, 15 East, 456.

A conviction of the defendant "as not being the eldest son of an esquire, or of other person of higher degree," is good; *Rex v. Utley*, 1 T. R. 45, n.

An information for keeping a net, must negative the qualification; *Hebden v. Bluff*, 1 Chit. Rep. 607, n.

If is sufficient on a conviction against a carrier for having game in his possession, if the qualifications are negated in the information and adjudication, without negating them in the evidence; *Rex v. Turner*, 5 M. & S. 206.

Such a conviction need not negative the defendant's qualification to kill game; nor aver that he had the game in his possession "knowingly;" *Rex v. Marsh*, 4 D. & R. 260; 2 B. & C. 717.

A conviction should set out all the evidence, and not merely state the result of it; *Rex v. Lovat*, 7 T. R. 152; and see *Rex v. Clarke*, 8 T. R. 222.

A conviction stating in the information that the defendant "killed a hare," is bad; *Rex v. Morgan*, 2 Chit. Rep. 563.

Evidence in support of an information before a magistrate under the game laws, cannot be received in the absence of the defendant, at least, where he has not been personally served with a summons to appear to the information. Whether in such case, an attorney is by law entitled to be present, and to act for the defendant before the magistrate, *quære*; *Rex v. Commins*, 8 D. & R. 344.

The informer cannot be a witness; *Rex v. Stone*, 2 Ld. Raym. 1545; *Rex v. Blaney*, 2 Andr. 240.

A magistrate who convicts an unqualified person of killing game, and causes his dog to be brought for the purpose of seizing it, may order the dog to be killed, without any formal adjudication of seizure; *Kingsworth v. Button*, 5 Taunt. 416, 1 Marsh, 106.

And he may take a gun used by an unqualified person; *Devensk v. Metuas*, 7 Mod. 215.

But not the gun of a gamekeeper, though he be not within his own manor; *Rogers v. Carter*, 2 Wils. 286.

Semble, that he cannot himself enter a house to search for engines, &c.; *Briggs v. Evelyn*, 2 H. Bl. 114.

Fifthly. The lord of a hundred or wapentake cannot grant a deputation to a gamekeeper; *Earl of Aylesbury v. Pattison*, 1 Doug. 28.

Bodies corporate, lords of manors, are not prevented by 3 G. I. c. 11, from appointing unqualified persons their gamekeepers. A deputation to a gamekeeper, who is neither himself qualified, nor is a servant to the lord of the manor, need not state on the face of it that he is appointed to kill game for the use of the lord; and it will be presumed that the game he kills is for the lord's use, till the contrary is proved; *Spurrier v. Vale*, 1 Camp. 457; 10 East, 413.

The gamekeeper of a lord of a manor may carry a gun any where out of the manor; *Rogers v. Carter*, 2 Wils. 387.

A gamekeeper authorized by his deputation to seize greyhounds, setting dogs, ferrets, and to do all other things belonging to the office of gamekeeper, has no right to seize hounds; *Grant v. Hutton*, 1 B. & A. 134.

A gamekeeper is not empowered to seize game in the possession of an unqualified person, under a general direction from the lord of the manor,

and pecuniary, by different statutes; on any of which, but only on one at a time, the justices may convict in a summary way, or, in most of them, prosecutions may be carried on at the assizes. And, lastly, by statute 28 Geo. II. c. 12, no person, however qualified to *kill*, may make merchandize of this valuable privilege, by *selling* or exposing to sale any game, on pain of like forfeiture as if he had no qualification (33) (34).

though the seizure is made within the manor; *Bird v. Dale*, 7 Taunt. 560; 1 J. B. Moore, 290.

It is no defence to debt for penalties on the game laws that the defendant acted *bonâ fide* as the gamekeeper of a manor, under a deputation from a person claiming a right to appoint the gamekeeper, there being no ground for the claim; *Calcraft v. Gibbs*, 5 T. R. 19.

Semble, that a deputation is not evidence of qualification, without proof of registration with the clerk of the peace; nor admissible as evidence of the existence of a manor, without a foundation being first laid in fact; *Rushworth v. Craven*, 1 M'Clel. and Y. 417.

(33) It will be seen by reference to the statute 1 & 2 W. IV. c. 32, set out at the commencement of note (32), ante 174, that the buying and selling of game is now legalised under certain regulations and restrictions.

(34) Under the head of offences against the public economy, it may be allowable to mention that of selling public offices. The ancient statutes of 12 R. II. c. 2, "that none shall obtain offices by suit, or for reward, but upon desert," which Lord Coke says is worthy to be written in letters of gold, but more worthy to be put in due execution, Co. Litt. 234, and that of 5 and 6 E. VI. c. 16, "against buying and selling of offices," imposed only civil restrictions upon this offence, and civil disabilities upon offenders. But by the 49 Geo. III. c. 126, reciting the 5 & 6

E. VI. c. 16, and extending its provisions to Scotland and Ireland, *and to all offices in the gift of the crown, &c.*; persons buying or selling, or receiving or paying money or reward for any such office; and persons receiving or paying money for soliciting or obtaining any such office, or any negotiation or pretended negotiation relating thereto; and persons opening or advertising houses for transacting business relating to the sale of any such office; shall be respectively deemed and adjudged guilty of a misdemeanor: and offences against this Act, committed abroad, shall be tried in the court of King's Bench at Westminster, under the 42 Geo. III. c. 85. Commissions in the East India Company's service are expressly mentioned by the statute, and several instances have occurred, one very recently, of persons convicted and punished for the sale and negotiation of such offices. See two modern decisions bearing upon this subject generally, *Hughes v. Statham*, 6 D. & R. 219; 4 B. & C. 187; *Waldo v. Martin*, 6 D. & R. 364; 4 B. & C. 319: and see the other cases collected in 1 Chit. Stat. 740, in notis; 3 Chit. Com. L. 98; Harrison's Digest, *Officer*; Com. Dig. *Officer*, K. 1. See the 6 Geo. IV. c. 82 & 83, for abolishing the sale of offices in the courts of King's Bench and Common Pleas. As to bribery at elections, see this work, vol. I., 179, ante, 140, and the statutes 53 Geo. III. c. 89, and 7 & 8 Geo. IV. c. 37.

CHAPTER XIV.
OF HOMICIDE.

IN the ten preceding chapters we have considered, first, such crimes and misdemeanors as are more immediately injurious to God, and his holy religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the king, the father and representative of his people; fourthly, such as more directly infringe the rights of the public or commonwealth, taken in its collective capacity; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure *individuals* or private subjects.

Of crimes affecting individuals,

Were these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured: the manner of obtaining which was the subject of our inquiries in the preceding volume. But the wrongs, which we are now to treat of, are of a much more extensive consequence; 1. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is, *that, besides the private satisfaction due and given in many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offences is always at the suit and in the name of the king, in whom by the texture of our constitution the *jus gladii*, or executory power of the law, entirely resides. Thus too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents: first, for the private wrong to the party injured; secondly, for the offence against the king by disobedience to the laws; and thirdly, for the

Which are considered both as public and private wrongs,

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crime against the public by their evil example (a). Of which we may trace the groundwork, in what Tacitus tells us of his Germans (b); that, whenever offenders were fined "*pars mutctæ regi, vel civitati, pars ipsi qui vindicatur vel propinquis ejus, exsolvitur* (1)."

and are of three kinds;

These crimes and misdemeanors against private subjects are principally of three kinds; against their *persons*, their *habitations*, and their *property*.

I. Crimes affecting the persons of individuals, as homicide,

Of crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great Creator; and of which therefore no man can be entitled to deprive himself of another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the Creator has given us; the divine laws, I mean, of either nature or revelation. The subject therefore of the present chapter will be the offence of *homicide*, or destroying the life of man, in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

which is of three kinds, *justifiable*, *excusable*, and *felonious*.

Now homicide, or the killing of any human creature, is of three kinds; *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the second very little: but the *third is the highest crime against the law of nature that man is capable of committing.

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I. *Justifiable* homicide, as, by necessity, or command of law.

I Justifiable homicide is of divers kinds.

1. Such as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted

(a) Stiernhook, l. 1, c. 5.

(b) De mor Germ. c. 12.

(1) "Part of the fine is paid to the king, or the state, and part to the person who is injured, or his relations."

or outlawed, deliberately, uncompelled, and extrajudicially, is murder (c). For, as Bracton (d) very justly observes, "*istud homicidium, si fit ex livore, vel delectatione effundendi humanum sanguinem licet justè occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam* (2)." And further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder (e). And upon this account sir Matthew Hale himself, though he accepted the place of a judge of the Common Pleas under Cromwell's government, since it is necessary to decide the disputes of civil property in the worst of times, yet declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission (f): a distinction perhaps rather too refined; since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is *required* by law to do it, which requisition it is, that justifies the homicide. If another *person doth it of his own head, it is held to be murder (g): even though it be the judge himself (h). It must further be executed, *servato juris ordine*; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versâ*, it is murder (i): for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law: but if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide, and besides, this licence might occasion a very gross abuse of his power. The king indeed may remit part of a sentence; as in the case of treason, all but the beheading;

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(c) 1 Hal. P. C. 497.

(d) Fol. 120.

(e) 1 Hawk P. C. 70; 1 Hal. P. C. 497.

(f) Burnet in his Life.

(g) 1 Hal. P. C. 501; 1 Hawk. P. C. 70.

(h) Dalt. Just. c. 150.

(i) Finch. L. 31; 3 Inst. 52; 1 Hal. P. C. 501.

(2) "This homicide, if it be done out of malice, or from an inclination to shed human blood, although the

party may be justly slain, still the slayer is guilty of a capital offence, on account of his corrupt intent."

but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is *to be hanged*, the king, it hath been said, cannot legally order even a peer to be beheaded (*k*). But this doctrine will be more fully considered in a subsequent chapter.

or, by *permission* of law, for the advancement of justice, or, the prevention of crime,

for which also there must be an apparent necessity;

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Again; in some cases homicide is justifiable, rather by the *permission*, than by the absolute *command*, of the law, either for the *advancement* of public *justice*, which without such indemnification would never be carried on with proper vigour; or, in such instances where it is committed for the *prevention* of some atrocious *crime*, which cannot otherwise be avoided.

2. Homicide, committed for the *advancement* of public *justice*, are; 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him (*l*). 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him (*m*). This is similar to the old Gothic constitutions, which, Stiernhook informs us (*n*), "*furem, si aliter capi non posset, occidere *permittunt* (3)." 3. In case of a riot, or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law (*o*), and by the Riot Act, 1 Geo. I. c. 5. 4. Where the prisoners in a gaol, or going to gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable, for the sake of preventing an escape (*p*). 5. If trespassers in forests, parks, chases, or warrens, will not surrender themselves to the keepers, they may be slain; by virtue of the statute 21 Edw. I. st. 2. *de malefactoribus in parcis*, and 3 and 4 W. and M. c. 10 (4). But in all these cases, there must be an apparent necessity on the officer's side; *viz.* that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-

(*k*) 3 Inst. 52, 212.

(*l*) 1 Hal. P. C. 494; 1 Hawk. P. C. 71.

(*m*) 1 Hal. P. C. 494.

(*n*) De jure Goth. l. 3, c. 5.

(*o*) 1 Hal. P. C. 495; 1 Hawk P. C. 161.

(*p*) 1 Hal. P. C. 496.

(3) A thief, if he can be apprehended by no other means, may be put to death.

(4) 21 Edw. I. st. 2, is repealed by

7 & 8 Geo. IV. c. 27, and 3 & 4 W. & M. c. 10, by 16 Geo. III. c. 30, which latter is also repealed by 7 & 8 Geo. IV. c. 27.

stealers could not but escape, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable (5). 6. If the champions in a trial by battle killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favour of the truth (q) (6).

3. In the next place, such homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is justifiable by the law of nature (r); and also by the law of England, as it stood so early as the time of Bracton (s), and as it is since declared by statute 24 Hen. VIII. c. 5 (7). If any person attempts a robbery or murder of another, or attempts to break open a house, *in the night time*, which extends also to an attempt to burn it (t), and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house *in the day time*, unless it carries with it an attempt of robbery also (8). So the Jewish law, which punished no theft with

and they must be to prevent crimes accompanied with force, as robbery, murder, burglary.

(q) 1 Hawk. P. C. 71.

(s) Fol. 155.

(r) Puff. L. of N. 1. 2, c. 5.

(t) 1 Hal. P. C. 488.

(5) If a person commits felony, and flies, or resists those who attempt to apprehend him, or is indicted of felony, and flies, or is arrested by warrant or process of law, and escapes, or is being conveyed to prison, and escapes; in any of these cases, if he cannot be taken alive, and is killed in the act of resistance, the homicide is justifiable; 1 Hale, P. C. 489; 1 East, P. C. 298. So, if an officer has a warrant against A., *by name*, for felony, or if A. is indicted for felony, or if the hue and cry is levied against him, *by name*; in any of these cases, if A., though innocent, flies or resists, and is killed by the officer or any other person aiding him, during flight or resistance, the person so killing him is indemnified; Fost. 318; 1 East, P. C. 300. And the officer, it seems, would be equally indemnified, though he had no warrant, if he acted on a charge of felony, and on reason-

able suspicion, even though it should appear in the result that no felony had been committed; *Samuel v. Payne*, Doug. 359; *Guppy v. Brittlebank*, 5 Price. 525.

(6) The trial by battle is abolished by 59 Geo. III. c. 46; see further upon that subject, post, 346.

(7) Repealed by 9 Geo. IV. c. 31, § 10 of which enacts, that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony.

(8) A person set to watch a yard or garden, is not justified in shooting any one who comes into it, *even in the night*, though he should see the party go into his master's hen-roost; but if from the conduct of the party he has fair grounds for believing his own life in actual and immediate danger, he is justified in shooting him; *Rex v.*

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death, makes homicide only justifiable in case of *nocturnal* housebreaking; if a thief be found breaking up, and he be "smitten *that he die, no blood shall be shed for him: but if the sun be risen upon him, there shall blood be shed for him; for he should have made full restitution (*u*).” At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact (*w*): and, by the Roman law of the twelve tables, a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon (*x*); which amounts very nearly to the same as is permitted by our own constitutions.

rape, &c.

The Roman law also justifies homicide, when committed in defence of the chastity either of one's self or relations (*y*): and so also, according to Selden (*z*), stood the law in the Jewish republic. The English law likewise justifies a woman, killing one who attempts to ravish her (*a*): and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter: but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other (*b*). And I make no doubt but the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting.

(*u*) Exod. xxii. 2.

(*w*) Potter. Antiq. b. 1, c. 24.

(*x*) Cic. pro Milone, 3. Ff. 9, 2. 4

(*y*) “*Divus Hadrianus rescipit, eum qui stuprum sibi vel suis inferentem occidit, dimittendum.*” (Ff. 48, 8, 1.)

“The divine Hadrian made an edict, that he who slew another in the act of

violating the chastity of himself, or any of his relatives, was to be held excusable.”

(*z*) De legib. Hebræor. l. 4, c. 3.

(*a*) Bac. Elem. 34; 1 Hawk. P. C. 71.

(*b*) 1 Hal. P. C. 485, 486.

Scully, 1 C. & P. 319. If the servant of the owner of property find a party actually committing an offence against the 7 & 8 Geo. IV. c. 29, (the Larceny Act, see post, cap. 17,) and apprehends him under section 63 of that Act, and while taking him to a magistrate, such party kills him, this is murder; but if the servant either did

not see him in the actual commission of the offence, or be taking him to any other place than before a magistrate, it is not murder; *Rex v. Curran*, 3 C. & P. 397. If a man be found attempting to commit a felony in the night, anyone may apprehend and detain him, until he can be carried before a magistrate; *Rex v. Hunt*, 1 R. & M. C. C. 93.

But we must not carry this doctrine to the same visionary length that Mr. Locke does; who holds (c), "that all manner of force without right upon a man's person, puts him in a state of war with the aggressor: and, of consequence, that being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other *well-regulated community is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be *prevented* by death, unless the same, if committed, would also be *punished* by death.

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In these instances of *justifiable* homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error, or omission: so trivial, however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

II. Excusable homicide is of two sorts; either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

1. Homicide *per infortunium* or *misadventure*, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun, is shooting at a mark, and undesignedly kills a man (d): for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure: for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases, according to the circumstances, murder (e);

II. Excusable, as,

by misadventure in the performance of a lawful act;

(c) Ess. on Gov. p. 2, c. 5.

(e) 1 Hal. P. C. 473, 474.

(d) 1 Hawk. P. C. 73, 74.

[*183] for the act of immoderate correction is unlawful. *Thus by an edict of the emperor Constantine (*f*), when the rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner, "*immoderate suo jure utatur, tunc reus homicidii sit* (9)."

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and swordplaying, the succeeding amusement of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony or manslaughter. But, if the king command or permit such diversion, it is said to be only misadventure; for then the act is lawful (*g*). In like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games authorized or permitted by the state, was not held to be guilty of homicide (*h*). Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful: but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence (*i*) (10). And in general, if death ensues in consequence of an idle, dangerous, and unlawful

(*f*) Cod. l. 9, t. 14.

(*g*) 1 Hal. P. C. 473; 1 Hawk. P. C. 74.

(*h*) Plato, de L. L. lib. 7. Ff. 9, 2, 7.

(*i*) Hawk. P. C. 73.

(9) If he exercises his own rights wantonly or immoderately, then he is guilty of homicide.

(10) If a person is driving a cart at an unusually rapid pace, and drives over another, and kills him, he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so, if he had not been in a state of intoxication; *Rex v. Walker*, 1 C. & P. 320. But an indictment formanslaughter, charging that the prisoner "did compel and

force" A. & B. who were working at a certain windlass, to leave the said windlass, and by such compulsion and force, &c., the deceased was killed, is not supported by evidence that the prisoner was working the windlass with A. & B.; and that by his going away they were not strong enough to work it, in consequence of which they let it go; as the words "compel and force" must be taken to mean *active* force; *Rex v. Lloyd*, 1 C. & P. 301.

sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts (*k*) (11).

2. Homicide in *self-defence*, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence must be distinguished from that just now mentioned, as calculated to *hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defence, which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or, as some rather choose to write it, *chaud-medley*, the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import: but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen.

or in self-defence; in cases of sudden and imminent peril.

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(*k*) Hawk. P. C. 74; 1 Hal. P. C. 472; Fost. 261.

(11) Whenever death is the consequence of idle, dangerous, and unlawful sports, or of heedless, wanton, and indiscreet acts, without a felonious intent, the party causing the death is guilty of manslaughter. As, if a man rides an unruly horse amongst a crowd of people, 1 East, P. C. 231; or throws a stone, or shoots an arrow, over a wall, into a public and frequented street, 1 Hale, P. C. 475; or discharges his pistols in a public street upon alighting from his carriage, 1 Stra. 481; or throws a stone at a horse, which strikes a man, 1 Hale, P. C. 39; in any of these cases, though the party may be perfectly innocent of any mischievous intent, still, if death ensues, he is guilty of manslaughter. So, if the owner suffers to be at large any animal which he knows to be vicious and mischievous, and it kills a man, it has been thought by some that he may be indicted

for manslaughter; but it is well agreed that he is guilty of a high misdemeanor, 2 Hawk. P. C. c. 13, § 8; and, in a very recent case of that kind, Best, C. J., laid it down as law, "that if a person thinks proper to keep an animal of this description (a bull), knowing its vicious nature, and another person is killed by it, it will be manslaughter in the owner, *if nothing more*; at all events it will be an *aggravated* species of manslaughter; *Blackman v. Simmonds*, 3 C. & P. 140. If workmen, in the ordinary course of their business, throw rubbish from a house in a direction in which persons are likely to pass, and any one passing is killed, this is manslaughter; 1 East, P. C. 262. Killing a person in a prize-fight is manslaughter; *Ward's case*, 1 East, P. C. 270; *Rex v. Murphy*, 6 C. & P. 103. As to what are lawful sports, see Pulton, title, *Riot*.

VIII. c. 5, and our ancient books (*l*), that it is properly applied to such killing as happens in self-defence upon a sudden rencounter (*m*). This right of natural defence does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence, but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible, or, at least probable, means of escaping from his assailant (*12*).

The manner of the defence is the criterion between excusable homicide and manslaughter.

It is frequently difficult to distinguish this species of homicide, upon *chance-medley* in self-defence, from that of manslaughter, in the proper, legal sense of the word (*n*). But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer hath not begun to fight, or, having begun, endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his

(*l*) Staunf. P. C. 16.

(*n*) 3 Inst. 55.

(*m*) 3 Inst. 55, 57; Fost. 275, 276.

(12) The general principle seems to be this. If a man is attacked in such a manner that there is no possibility of his escaping without killing his assailant, he is justified in doing so, after having done his utmost to retreat; Fost. 278; Kel. 828. But no assault, however violent, will justify killing the assailant, under the plea of necessity, unless there is a clear manifestation of a felonious intent; 1 East, P. C. 277; 1 Russell, 551. However, not only he who on an assault retreats to a distance beyond which he can go no farther before he kills the other, is adjudged by the law to act upon unavoidable necessity; but also he who, being assaulted in such a manner and in such a place, that he cannot retreat without endangering his life, kills the

other without retreating at all; 1 Hawk. P. C. c. 29, § 14; Bro. Coro. 125; 43 Ass. 31; 3 Inst. 56; 1 Hale, P. C. 41. And though a person who retreats from an assault to the wall, gives the other divers wounds in his retreat, yet, if he give him no mortal one till he gets thither, and then kill him, he is guilty of homicide *se defendendo* only; 1 Hawk. P. C. c. 29, § 15; 1 Hale, P. C. 41; Crom. 28. And an officer who kills one who resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact without retreating at all; 1 Hawk. P. C. c. 29, § 16; 1 Hale, P. C. 41; 3 Inst. 56; Crom. 28, a.

own destruction, this is homicide excusable by self-defence (*o*). For which reason the law requires, that the person, who kills another in his own defence, *should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant: and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects, the law countenances no such point of honour: because the king and his courts are the *vindices injuriarum*, and will give to the party wronged, all the satisfaction he deserves (*p*). In this the civil law also agrees with ours, or perhaps goes rather further; "*qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt* (*q*) (13)." The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him (*r*): for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice (*s*), as well as of the municipal law.

And, as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A. and B., agree to fight a duel, and A. gives the first onset, and B. retreats as far as he safely can, and then kills A., this is murder; because of the previous malice and concerted design (*t*) (14). But if A. upon a sudden quarrel

The *time* of the defence is also to be considered.

(*o*) Fost. 277.

(*p*) 1 Hal. P. C. 481, 483.

(*q*) Ff. 9, 2, 45.

(*r*) 1 Hal. P. C. 483.

(*s*) Puff. b. 2, c. 5, § 13.

(*t*) 1 Hal. P. C. 479.

(13) Those who, when they cannot otherwise defend themselves, destroy their assailants, are innocent.

(14) But if two persons quarrel, and begin to fight on equal terms, when

one, finding himself not equal to his adversary, runs away, and being pursued, draws a knife, and when he is taken by his adversary, stabs him, and death ensues, this would be only man-

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assaults B. first, and upon B.'s returning the assault, A. really and *bonâ fide* flees; and, being driven to the wall, turns again upon B. and kills him; this may be *se defendendo* according to some of our writers (u): *though others (w) have thought this opinion too favourable; inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse, of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself (x).

Homicide may be excusable, both by necessity and in self-defence.

There is no species of homicide *se defendendo*, where the person slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon (y), where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expence of another man's, is excusable, through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.

Homicides by misadventure and in self-defence agree in their blame and punishment:

Let us next take a view of those circumstances wherein these two species of homicide, by misadventure and self-defence, agree; and those are in their blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence,

(u) 1 Hal. P. C. 482.

(w) 1 Hawk. P. C. 75.

(x) 1 Hal. P. C. 484.

(y) Elem. c. 5; see also 1 Hawk. P. C. 73.

slaughter: though, if before the conflict began, the party had drawn the knife in cool blood, in case death had

ensued, the offence would have been murder; *Rex v. Kessall*, 1 C. & P. 437, and see *Rex v. Shaw*, 6 C. & P. 372.

or at least a want of sufficient caution in him who was so unfortunate as to commit it; who therefore is not altogether faultless (z). And as to the necessity which excuses a man who *kills another *se defendendo*, Lord Bacon (a) entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed: and since in quarrels both parties may be, and usually are, in some fault; and it scarce can be tried who was originally in the wrong; the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side (15). The law besides may have a further view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who slays his neighbour, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

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Nor is the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it. And the mosai-cal law (b) appointed certain cities of refuge for him "who killed his neighbour unawares: as if a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down a tree, and the head slip-peth from the helve, and lighteth upon his neighbour that he die, he shall flee unto one of these cities and live." But it seems he was not held wholly blameless, any more than in the English law; since the avenger of blood might slay him

(z) 1 Hawk. P. C. 72.

(b) Numb. c. 35, and Deut. c. 19.

(a) Elem. c. 5.

(15) If I find a man concealed in my house at night, it will be a matter of great nicety for me to decide what attendant circumstances afford such evidence of a felonious intention on his part, as will justify me in putting him to death. His being armed would be a strong circumstance, and would seem

to warrant me in adopting immediate and effectual measures for my own defence; and yet I am bound, if possible, in such a case, to use the utmost circumspection; see *Rex v. Scully*, ante 180, note (8); *Levett's case*, 1 East, P. C. 275, and the observations of Foster, J., thereon, Fost. 299.

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before he reached his asylum, or if he afterwards stirred out of it till the death of the high priest. In the imperial law likewise (c) the casual homicide was excused, by the indulgence the emperor signed with his own sign manual, "*adnotatione principis*:" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks (d) homicide by misfortune was expiated by voluntary *banishment for a year (e). In Saxony a fine is paid to the kindred of the slain; which also, among the Western Goths, was little inferior to that of voluntary homicide (f): and in France (g) no person is ever absolved in cases of this nature, without a largess to the poor, and the charge of certain masses for the soul of the party killed.

The penalty inflicted by our laws is said by Sir Edward Coke to have been anciently no less than death (h); which however, is with reason denied by later and more accurate writers (i). It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others only of part of them, by way of fine or *weregild* (k): which was probably disposed of, as in France, *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul, who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty, especially if a total forfeiture, growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach (l), a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same (m) (16). And indeed to prevent this expence, in cases where the death

(c) Cod. 9, 16, 5.

(d) Plato. de Leg. lib. 9.

(e) To this expiation by banishment the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third Iliad, that, when a child, he was obliged to flee his country for casually killing his play-fellow; *νηπιος ἔκ' ἐθελων*.

(f) Stiernh. de jure Goth. l. 3, c. 4.

(g) De Mornay on the Digest.

(h) 2 Inst. 148, 315.

(i) 1 Hal. P. C. 425; 1 Hawk. P. C. 75; Fost. 282, &c.

(k) Fost. 287.

(l) Fost. 283.

(m) 2 Hawk. P. C, 381.

(16) But now all forfeiture and punishment is removed in such cases.

See 9 Geo. IV. c, 31, § 10; ante 180, note (7).

has notoriously happened by misadventure or in self-defence, the judges will usually permit, if not direct, a general verdict of acquittal (*n*) (17).

III. Felonious homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

III. *Felonious*, as either killing one's self or another.

Self-murder, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law (*o*), yet was punished by the Athenian law with cutting off the hand which committed the desperate deed (*p*). And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessaries before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder (*q*) (18). A *felo de se* therefore is he that deliberately puts an end to

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Self-murder admits of accessaries before the fact;

(*n*) Fost. 288.

(*o*) "*Si quis impatientia doloris aut tædio vitæ, aut morbo, aut furore, aut pudore, morimaluit, non animadvertatur in eum.*" Ff. 49, 16, 6. "If any one from impatience of pain, or weariness

of life, or disease, or madness, or shame, prefers death, no blame shall be imputed to him."

(*p*) Pott. Antiq. b. 1, c. 26.

(*q*) Keilw. 136.

(17) Where the homicide does not amount to murder or manslaughter, it is now the universal practice to direct an acquittal.—CH.

(18) If a man encourages another to murder himself, and is present abetting him while he does so, such person is guilty of murder as a principal. If two encourage each other to murder themselves together, and one does so,

but the other fails in his attempt upon himself, he is a principal in the murder of the other. But if it be uncertain whether the deceased really killed himself, or whether he came to his death by accident, before the moment when he meant to destroy himself, it will not be murder in either. *Rex v. Dyson*, R. & R. C. C. 523.

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his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if attempting to kill another, he runs upon his antagonist's sword: or, shooting at another, the gun bursts and kills himself (*r*) (19). The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroner's juries are apt to carry it, viz. that the very act of suicide is an evidence of insanity; as if every man, who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos*, as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in a former chapter (*s*), to *form a legal excuse. And therefore if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man (*t*) (20).

(*r*) 1 Hawk. P. C. 68; 1 Hal. P. C. 413.

(*s*) See page 24.

(*t*) 1 Hal. P. C. 412.

(19) Not only he who kills himself with a deliberate and direct purpose of so doing, but also in some cases he who maliciously attempts to kill another, and in pursuance of such attempt unwittingly kills himself, shall be adjudged in the eye of the law a *felo de se*; for wherever death is caused by any act done with a murderous intent, it makes the offender a murderer. 1 Hawk. P. C. c. 27, § 4; Bro. Cor. 12, 14; 1 Hale, P. C. 28, 29; Pult. 119, b.; Crom. 28. He who kills another upon his desire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head; and the person killed is not looked upon as a *felo de se*, inasmuch as his assent was merely void, being against the law of God and man; 1 Hawk. P. C. c. 27, § 6; Keilw. 136; Moor, 754. And see *Rex v. Sawyer*, 1 Russel, 424; *Rex v. Evans*, id. 426.

(20) Suicide is a proof of cowardice rather than of courage, and as the fear of disgrace and punishment is known

to operate strongly upon the minds of those who are considered lunatic, I have often thought that it would be a wise law if the present distinction and consequences of insanity and sanity in the case of suicide were abolished, and it were enacted that the coroner in every instance when his jury had found that the person deceased had been the author of his own death, should be directed to deliver the dead body to the surgeons to be anatomized.

The lives of many, more especially of the female sex, would be preserved, and the valuable science of chirurgery would be improved.

The instances of females attempting or committing suicide are now very numerous. There is reason to think that they suppose it an honourable proof of fortitude or of faithful attachment to an object, who has occasioned disappointment; this can only be counteracted by the apprehension that their bodies will be mangled by the surgeon's knife, and exposed to public view.

But now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former by an ignominious burial in the highway, with a stake driven through his body (21); on the latter by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from so desperate and wicked an act. And it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself; the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term; which gives a title to the king, prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death (*u*). And though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign, who upon this, as on all other occasions, is reminded by the oath of his office to execute judgment in mercy (22).

and is punishable by ignominious burial, and forfeiture of goods.

(*u*) Finch. L. 216.

Many are found insane by a coroner's jury who have done no irrational act or given no proofs of insanity before the act of suicide, and who would never have been found insane by a jury at the assizes under the direction of a judge, if they had killed any other person. Yet the principles of the law in both cases are precisely the same.—CH.

(21) But now by 4 Geo. IV. c. 52, § 1, it shall not be lawful for any coroner, or other officer having authority to hold inquests, to issue any warrant or other process directing the interment of the remains of persons, against whom a finding of *felo de se* shall be had, in any public highway; but such coroner or other officer shall give directions for the private interment of the remains of such person *felo de se*, without any stake being dri-

ven through the body of such person, in the churchyard or other burial-ground of the parish or place in which the remains of such person might by the laws or customs of England be interred, if the verdict of *felo de se* had not been found against such person, such interment to be made within twenty-four hours from the finding of the inquisition, and to take place between the hours of nine and twelve at night. Proviso (§ 2,) not to authorize the performing of any of the rites of christian burial on the interment of the remains of any such person, nor to alter the laws or usages relating to the burial of such person, except so far as relates to the interment of such remains in such yard or burial-ground at such time and in such manner.

(22) As to what a *felo de se* shall

Killing another
may be murder,
or, man-
slaughter;

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence into *manslaughter* and *murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this, that manslaughter, when voluntary, arises from the sudden heat of the passions, murder from the wickedness of the heart.

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manslaughter
does not admit
of accessories
before the fact;
is *voluntary*,

1. Manslaughter is therefore thus defined (*u*), the unlawful killing of another, without malice either express or implied: which may be either voluntary, upon a sudden heat; or involuntary, but in the commission of some unlawful act. These were called in the Gothic constitutions "*homicidia vulgaria; quæ aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiæ calore et impetu* (*w*) (23)." And hence it follows, that in manslaughter there can be no accessories before the fact; because it must be done without premeditation.

as killing ano-
ther in a sudden

As to the first, or *voluntary* branch: if upon a sudden quarrel two persons fight, and one of them kills the other,

(*u*) 1 Hal. P. C. 466.

(*w*) Stiern. de jure Goth. l. 3, c. 4.

forfeit, it seems clear, that he shall forfeit all chattels real or personal which he has in his own right; and also all chattels real whereof he is possessed, either jointly with his wife, or in her right; and also all bonds and other personal things in action, belonging solely to himself; and also all personal things in action, and, as some say, entire chattels in possession to which he was entitled jointly with another, on any account, except that of merchandize. But it is said that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator. 1 Hawk. P. C. c. 27, § 7. The blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower; 1 Hawk. P. C. c. 27, § 8; Plowd. 261, b. 262, a; 1 Hale, P. C. 413. The will of a *felo de se*, therefore,

becomes void as to his personal property, but not as to his real estate; Plowd. 261. No part of the personal estate of a *felo de se* vests in the king, before the self-murder is found by some inquisition; and, consequently, the forfeiture thereof is saved by a pardon of the offence before such finding; 5 Co. Rep. 110 b; 3 Inst. 54; 1 Saund. 362; 1 Sid. 150, 162. But if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time of the act done by which the death was caused, and all intermediate alienations and titles are avoided; Plowd. 260; 1 Hale, P. C. 29; 5 Co. Rep. 110; Finch, L. 216. See also upon this subject, *Lambert v. Taylor*, 6 D. & R. 888; 4 B. & C. 138.

(23) Trivial homicides; which are committed either involuntarily, or even voluntarily, but in some sudden heat and gust of anger.

this is manslaughter: and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion (*x*): and the law pays that regard to human frailty, as not to put a hasty and deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter (*y*) (24). But in this, and in every other case of homicide, upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder (*z*). So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot; though this was allowed by the laws of Solon (*a*), as likewise by the Roman civil law, if the adulterer was found in the husband's own house (*b*), and also among the ancient Goths (*c*); yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, *but it is manslaughter (*d*). It is however the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation (*e*). Manslaughter therefore on a sudden provocation differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge (25).

quarrel, or under great provocation;

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The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this; that

or involuntary as killing a man by an act law-

(*x*) 1 Hawk. P. C. 82.

(*y*) Kelyng. 135.

(*z*) Fost. 296.

(*a*) Plutarch, in vit. Solon.

(*b*) Ff. 48, 5, 24.

(*c*) Stiernh. de jure Goth. 1. 3, c. 2.

(*d*) 1 Hal. P. C. 486.

(*e*) Sir T. Raym. 212.

(24) Where, after mutual blows between the prisoner and the deceased, the prisoner knocked the deceased down; and, after he was on the ground, stamped upon his stomach and belly

with great force, the offence was held to be manslaughter only; *Rex v. Ayes*, R. & R. C. C. 166.

(25) See the notes, post, 199 to 201.

ful in itself, but
done in an un-
lawful manner;

misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other; this is manslaughter, because the original act was unlawful, but it is not murder, for the one had no intent to do the other any personal mischief (*f*). So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning (*g*); and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind (*h*). And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter (*i*) ac-

(*f*) 3 Inst. 56.

(*g*) Kel. 40.

(*h*) 3 Inst. 57.

(*i*) Our statute law has severely animadverted on one species of criminal negligence, whereby the death of a man is occasioned. For by statute 10 Geo. II. c. 31, if any waterman be-

tween Gravesend and Windsor receives into his boat or barge a greater number of persons than the Act allows, and any passenger shall then be drowned, such waterman is guilty, not of manslaughter, but of felony, and shall be transported as a felon.*

* Repealed, together with all other Acts for the regulation of watermen plying upon the river Thames, (vide ante, 64, note (27)), by 7 and 8 Geo. IV. c. 75; section 38 of which, after providing that no boat, &c., for carrying passengers on the river Thames, shall be used without a licence, expressing the number of persons it may be allowed to carry, and that the number and name of the owner shall be painted thereon, and imposing a penalty for infringing those provisions, enacts, that in case any greater number of passengers shall be carried in any boat, &c. than is allowed, and any one or more

of them shall by reason thereof be drowned, every person navigating such boat, &c., offending therein, and being thereof lawfully convicted, shall be deemed guilty of a misdemeanor, and shall be liable to such punishment as in cases of misdemeanor, at the discretion of the court; and shall be disfranchised, and not allowed thereafter to navigate any boat, &c. on the river Thames. It had been doubted whether a conviction, under the old statute, of a waterman for carrying in his boat, upon the river Thames, more persons than are by law allowed, must or must not proceed upon testimony given *on oath*:

according to the nature of the act which occasioned it. If it be in prosecution of a felonious *intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter (j) (26).

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(j) Foster, 258; 1 Hawk. P. C. 84.

(26) See the cases cited, ante 183, et seq., in notis. Accidental homicide may be murder, if it happen in the prosecution of an illegal act; as in carrying away furniture to avoid a distress for rent; *Rex v. Hodgson*, 1 Leach, 6; 1 East, P. C. 258.

The following are very recent decisions upon the subject of manslaughter:

All persons who by their presence encourage a fight from which death ensues to one of the combatants, are guilty of manslaughter, although they neither say nor do anything. But if the death be caused not by blows given in the fight itself, but by other parties breaking the ring, and striking the deceased with bludgeons, the persons who merely encourage the fight by their presence are not answerable; *Rex v. Murphy*, 6 C. & P. 103.

In a case of manslaughter, after the jury were charged, it was ascertained that the surgeon who examined the body was absent. The prisoner's counsel asked that the jury should be discharged. It was held that if the prisoner asked that the jury should be discharged, the judge had authority to order it to be done; *Rex v. Stokes*, 6 C. & P. 151.

A. was charged with manslaughter in killing B. by driving a cabriolet over him. C. saw the cabriolet pass, but did not see the accident; and immediately afterwards, on hearing B. groan, C. went up to him, when B. made a statement as to how the acci-

dent had happened. It was held that this statement was receivable in evidence on the trial of A.; *Rex v. Foster*, 6 C. & P. 325.

A. being on board a ship, and B. in a boat alongside, had a dispute about payment for some goods, both being intoxicated. A., to get rid of B., pushed away the boat with his foot; B., reaching out to lay hold of a barge, to prevent his boat from drifting away, over balanced himself, and fell into the water, and was drowned. A. was charged with manslaughter on the coroner's inquisition. It was held, on the trial, that these facts did not constitute that offence; *Rex v. Waters*, 6 C. & P. 328.

In order to render a declaration in articulo mortis admissible in a case of manslaughter, it is not necessary to prove expressions of the deceased, that he was in apprehension of almost immediate death; but the judge will consider from all the circumstances whether the deceased had, or had not, any hope of recovery; *Rex v. Bonner*, 6 C. & P. 386.

If A. and B. are riding fast along a highway, as if racing, and A. rides by without doing any mischief, but B. rides against the horse of C., whereby C. is thrown, and killed; this is not manslaughter in A.; *Rex v. Mastin*, 6 C. & P. 396.

A foot passenger was walking at lamp-light in the carriage-road along a public highway, when the owner of a

and, therefore, in *Rex v. Broderip*, 5 B. & C. 239; 7 D. & R. 861; the court of K. B. refused a mandamus

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to a magistrate to compel him to enforce such a conviction. The new statute removes this doubt; see § 74.

T

Next, as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels (27).

stabbing, a peculiar species of manslaughter.

But there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally *stabbing* another, though done upon sudden provocation. For by statute 1 Jac. I. c. 8, when one thrusts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers, between the Scotch and English, at the accession of James the first (*k*); and, being therefore of a temporary nature, ought to have expired with the mischief which it meant to remedy. For, in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt: unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath construed the

(*k*) 1 Lord Raym. 140.

cart, who was proved to be near-sighted, drove along, at the rate of eight or nine miles an hour, sitting at the time on a few sacks laid on the bottom of the cart, and ran over the foot passenger and killed him. It was held that he was guilty of such carelessness, as amounted to the crime of manslaughter; *Rex v. Grant*, 6 C. & P. 629.

In a case of death by stabbing, if the jury think that the wound was given by the prisoner while smarting under a provocation so recent and so strong that he might be considered as not being at the moment master of his own understanding, the offence will be only manslaughter; *Rex v. Hayward*, 6 C. & P. 157.

A servant of C. attempted to appre-

hend A., who was out at night poaching in a wood, and was killed by A. C. was neither the owner nor occupier of the wood, nor the lord of the manor, having only the permission of the owner to preserve game there. It was held that this was only manslaughter in A.; *Rex v. Addis*, 6 C. & P. 388.

(27) By 9 Geo. IV. c. 31, § 9, (repealing all former enactments on this subject,) every person convicted of manslaughter shall be liable, at the discretion of the court, to be transported beyond seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years, or to pay such fine as the court shall award.

statute so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing now stands almost upon the same footing as it did at the common law (*l*). Thus, (not to repeat the cases before mentioned, of stabbing an adulteress, &c. which are barely manslaughter, as at common law,) in the construction of this statute it hath been doubted, whether, if the deceased had struck at all before the mortal blow given, this does not take it out of the statute, though in the preceding quarrel the stabber had given the first blow; and * it seems to be the better opinion, that this is not within the statute (*m*). Also it hath been resolved, that the killing a man by throwing a hammer, or other blunt weapon, is not within the statute; and whether a shot with a pistol be so or not, is doubted (*n*). But if the party slain had a cudgel in his hand, or had thrown a pot or bottle, or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the statute (*o*) (28).

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(*l*) Fost. 299, 300.(*n*) 1 Hal. P. C. 470.(*m*) Fost. 301. 1 Hawk. P. C. 77.(*o*) 1 Hawk. P. C. 77.

(28) The 1 J. I. c. 8, together with the 43 G. III. c. 58, (Lord Ellenborough's Act,) and the 1 G. IV. c. 90, relating to the same subject, is repealed by 9 G. IV. c. 31; by § 11 of which it is enacted, that if any person unlawfully and maliciously shall administer, or attempt to administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a

felon. And by § 12, it is enacted, that if any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or, in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon: provided, that in case it shall appear, on the trial of any person indicted for any of the offences above specified, that such acts

2. We are next to consider the crime of deliberate and wilful *murder*: a crime at which human nature starts, and

of shooting, or of attempting to discharge loaded arms, or of stabbing, cutting, or wounding, as aforesaid, were committed under such circumstances, that if death had ensued therefrom, the same would not in law have amounted to the crime of murder, in every such case the person so indicted shall be acquitted of felony. There are two novelties in this Act of Parliament; first, the provisions in section 11, respecting *drowning, suffocating, and strangling*; and secondly, the introduction, in both ss. 11 and 12, of the word *wound*, after the words *stab and cut*. The latter is an improvement which had long been a desideratum, many indictments under the former statute having failed merely for the want of some such general term, where the injury inflicted did not fall strictly within the definition either of a stab or a cut. The new Act also places, attempts to murder, and attempts to maim, under two distinct clauses; it does not, however, make those offences distinct in their *nature*: it follows, therefore, that both may be charged in the same indictment. An indictment under this statute must describe with accuracy the *mode* in which the injury is inflicted; for where the indictment under 43 G. III. c. 58, was for *cutting*, and the evidence was that the wounds were inflicted by *stabbing*, the judges held the conviction wrong; *Rex v. M'Dermot*, R. & R. C. C. 356. The *intent*, also, with which the assault is made, must be correctly stated; for, where the intent laid in several counts of an indictment under the same statute was, to murder, to disable, or to do some grievous bodily harm, and the intent found by the jury was to prevent being apprehended, the conviction was held bad; *Rex v. Duffin*, id. 365; *Rex v. Marshall*, 2 Stark. Ev. 925. But, though the party's principal intent

was to prevent apprehension, he may still be convicted on an indictment imputing the intent to be to murder, if it appear that in order to effect the former intent, he also intended to murder; *Rex v. Gillow*, R. & M. C. C. 85; *Rex v. Davis*, 1 C. & P. 306. The specific offences mentioned in the statute, and the being present, aiding and abetting the offenders, are placed upon the same footing; therefore one indictment may contain counts for both; *Rex v. Towle*, R. & R. C. C. 314. Therefore, if an indictment for shooting at another, charge that a person, feloniously &c. did shoot with a pistol at A., and that the prisoner and others were *present, aiding and abetting, &c.* the said unknown person, *the said felony to do and commit, &c.*, this is sufficient, without its being stated that the prisoner was *feloniously* present; and the prisoner was held to be well convicted, though the jury found that he was not the person who fired the pistol; *Id. ibid.* The following cases have been decided under the old statute, with respect to the several offences of cutting, stabbing, and shooting, and seem equally applicable to the present statute: Where a cutting is inflicted by an instrument *capable* of cutting, the case is within the Act, though the instrument be not intended for cutting, nor ordinarily used to cut, but generally used to force open drawers, doors, &c.; and though the intention was not to cut, but to inflict some other mischief; *Rex v. Hayward*, id. 78. A striking over the face with the sharp or claw part of a hammer, has been held to be a sufficient cutting within the statute; *Rex v. Atkinson*, id. 104. But inflicting a wound with a square iron bar, or with the metal scabbard of a sword sheathed at the time, or with the handle of a windlass, has been held not to be a cutting; 1 Russell, 597, 598. Cutting a child's private

which is, I believe, punished almost universally throughout the world with death. The words of the mosaical law (over and above the general precept to Noah (*p*), that “whoso

out the world
with death;

(*p*) Gen. ix. 6.

parts so as to enlarge them for the time, may be considered as doing her grievous bodily harm, and done with that intent, though the hymen is not injured, the incision is not deep, and the wound eventually is not dangerous; *Rex v. Cox*, id. 362. An indictment for cutting with intent to murder and disable, is not supported by evidence of a cutting with intent to produce temporary disability, to prevent apprehension; *Rex v. Boyce*, R. & M. C. C. 29, 1 Russell, 598. If several are out for the purpose of committing a felony, and, upon an alarm, run different ways, and one of them maims (by cutting) a pursuer to avoid being taken, the others are not to be considered principals in such act; *Rex v. White*, R. & R. C. C. 99. To support an indictment for stabbing with intent to murder, malice against the individual is not essential, general malice is sufficient; *Rex v. Hunt*, R. & M. C. C. 93. And a grievous bodily harm need not actually be done; the intent is sufficient, Id. *ibid*. Nor need the wound be near a vital part, or of a nature likely to cause death; *Rex v. Griffith*, 1 C. & P. 298. If two persons quarrel, and begin to fight, on equal terms, and one, finding himself not equal to his adversary, runs away, and being pursued, draws a knife, and stabs him; if death ensue, this is only manslaughter, and, therefore, for such stabbing, the party cannot be convicted capitally under 43 G. III, c. 58; *Rex v. Kessal*, 1 C. & P. 437. In the case of shooting, if the instrument be fired so near, and in such direction, as to be likely to kill or to do other grievous bodily harm, and with intent that it should do so; the case will be within the statute, though it is loaded with powder and paper only; *Rex v. Kitchen*, R. & R. C. C. 95. But, it seems, that if a gun be not loaded at all, when it is

attempted to be discharged, as if the charge be lost by accident, &c. the case is not within the statute, however felonious the prisoner's intent may be; 1 Russell, 597. And, in an indictment under the statute for attempting to discharge a loaded blunderbuss at A., it was held, that in order to constitute the offence of attempting to discharge loaded fire-arms, they must be so loaded as to be capable of doing the mischief intended; *Rex v. Carr*, R. & R. C. C. 377. Upon an indictment for maliciously shooting, if it be questionable whether the shooting were by accident or design, proof may be given that the prisoner at another time intentionally shot at the same person; *Rex v. Voke*, id. 531. If a person shoot at another who is endeavouring to apprehend him, he may be convicted on the usual indictment for shooting with intent to murder under the statute, although shooting at a person with intent to prevent his apprehending the person shooting, is a distinct and capital offence; *Rex v. Davis*, 1 C. & P. 306; see also *Rex v. Towle*, R. & R. C. C. 314, *supra*. The new Act uses the term “loaded arms,” instead of “loaded fire-arms,” which was the language of the former Act, and will therefore comprehend every description of arms, as air-guns, &c. It may be observed, generally, that where the injury is inflicted with intent to prevent a lawful apprehension, it must be shewn that the offender had notice of the purpose for which he was apprehended; for otherwise, in case of death ensuing, the offence would be manslaughter, and the prisoner would be entitled to the benefit of the proviso in section 12; see *Ricket's case*, 1 Russell, 599. With respect to offences of this, and of other descriptions, committed upon the high seas; see, post, 268, notes (14) & (15).

sheddeth man's blood, by man shall his blood be shed,") are very emphatical in prohibiting the pardon of murderers (*q*). "Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it." And therefore our law has provided one course of prosecution, (that by appeal, of which hereafter) (29), wherein the king himself is excluded the power of pardoning murder: so that, were the king of England so inclined, he could not imitate that Polish monarch mentioned by Puffendorf (*r*): who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos, divini juris rigorem moderantes, &c.*" But let us now consider the definition of this great offence.

anciently defined to be a crime committed in secret;

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The name of *murder* (as a crime) was anciently applied only to the secret killing of another (*s*): (which the word, *moerda*, signifies in the Teutonic language (*t*),) and it was defined, "*homicidium quod nullo vidente, nullo scienti, clam perpetratur* (*u*) (30):" for which the vill wherein it was committed, or, if that were too poor, the whole hundred, was liable to a heavy *amercement; which amercement itself was also denominated *murdrum* (*w*). This was an ancient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder (*x*): and, according to Bracton (*y*), was introduced into this kingdom

(*q*) Numb. xxxv. 31.

(*r*) L. of N. b. 8, c. 3.

(*s*) Dial de. Scacch. l. 1, c. 10.

(*t*) Sternh. de. jure Sueon. l. 3, c. 3.

The word *murdre* in our old statutes also signified any kind of concealment or stifling. So in the statute of Exeter, 14 Edw. I. "*je riens ne celerai, ne sufferai estre celé ne murdré*:" which is thus translated into Fleta, l. 1, c. 18, § 4. "*Nullam veritatem celabo, nec celari permittam nec mudrari.*" And

the words "*pur murdre le droit*," in the articles of that statute, are rendered in Fleta, *ibid.* § 8, "*pro jure alicujus murdriendo*."—"I will not conceal, or suffer to be concealed, or murdered;" for, "*murdering, or suppressing, the right of any person.*"

(*u*) Glanv. l. 14, c. 3.

(*w*) Bract. l. 3, tr. 2, c. 15, § 7. Stat. Marlbr. c. 26; Fost. 281.

(*x*) Stiernh. l. 3, c. 4.

(*y*) l. 3, tr. 2, c. 15.

(29) Abolished by 59 G. III. c. 46; vide, ante, 180, post, 346.

(30) A homicide, secretly commit-

ted, out of all human sight, and without all human knowledge.

by king Canute, to prevent his countrymen, the Danes, from being privily murdered by the English; and was afterwards continued by William the conqueror, for the like security to his own Normans (z). And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman, (the presentment whereof was denominated *englescherie*,) (a), the country seems to have been excused from this burthen. But, this difference being totally abolished by statute 14 Edw. III. c. 4, we must now (as is observed by Staunforde) (b) define murder in quite another manner, without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

Murder is therefore now thus defined, or rather described, by Sir Edward Coke (c); "when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied." The best way of examining the nature of this crime will be by considering the several branches of this definition.

First, it must be committed by *a person of sound memory and discretion*: for lunatics or infants, as was formerly observed, are incapable of committing any crime: unless in such cases where they shew a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil (31).

(z) 1 Hal. P. C. 447.

(a) Bract. ubi supr.

(b) P. C. l. 1, c. 10.

(c) 3 Inst. 47.

(d) 1 Hal. P. C. 425.

(31) No infant under seven years of age can be punished for murder, or any other felony; 1 Hale, P. C. 27. Between the ages of seven and fourteen years, an infant is *prima facie* presumed to be *doli incapax*; though such presumption may be rebutted by strong evidence of his being able to distinguish right from wrong; 1 Hale, P. C. 26, 27; Fost. 72; Dalt. c. 147. At the age of fourteen years, an infant is presumed to be *doli capax*, and is punishable as an adult, without regard to sex; Fost. 70; 1 Russell, 4. It is not so easy to define in what cases a *lunatic*

shall be exempt from the consequences of committing murder. If it appears that the prisoner, from either natural or accidental causes, is liable to aberrations of mind which deprive him, for the time, of the ability to distinguish right from wrong, the jury must determine whether he committed the offence during such an aberration; and if they find that he did, must acquit him, *on that ground*; 39 & 40 G. III. c. 94, § 1. But he must answer for what he does in his lucid intervals; 1 Hale, P. C. 31. And if he is proved to have formed a design to commit murder, and

now, an unlawful killing with malice pre-pense;

the offender must be of sound mind,

there must be
an actual killing
by an unlawful
act,

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Next, it happens that when a person of such sound discretion *unlawfully killeth*. The unlawfulness arises from the killing *without warrant or excuse: and there must also be an actual killing to constitute murder: for a bare assault, with intent to kill, is only a great misdemeanor, though formerly it was held to be murder (*d*) (32). The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning*, he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving*. But where they only differ in circumstance, as if a *wound* be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial (*e*) (33).

(*d*) 1 Hal. P. C. 425.

(*e*) Inst. 319. 2 Hal. P. C. 185.

to have been aware of the consequences of the crime, when he conceived or committed it, he cannot be acquitted; *Arnold's case*, 16 How. St. Tr. 764; *Lord Ferrer's case*, 19, id. 947. And if he had any sense of right and wrong, it is immaterial how powerful the illusion under which he labours may be; *Beltingham's case*, 1 Collinson on Lunacy, 672. Under § 2 of 39 & 40 G. III. c. 94, a defendant, who, on trial for a misdemeanor, appears to be insane, and is found so by the jury, may be confined during his Majesty's pleasure. See further upon this subject, *ante*, 24 *et seq.* in *notis*, post, 324, 395.

(32) But by the recent statute, 9 G. IV. c. 31, sections 11 & 12, every assault with intent to murder, by whatever means, is made a capital felony. See *ante*, 194, note (28).

(33) See 1 East, P. C. 341, and *Sharwin's case*, there cited, in which it was held that an averment of an assault with a *wooden staff*, was satisfied by proof of an assault with a *stone*; the effect being the same; see *Rex v. Dale*, 13 Price, 172; 9 J. B. Moore, 19.

A *stroke* must be expressly averred, and an indictment stating that the prisoner murdered, or gave a mortal wound, without saying that he *struck*, is bad; *Rex v. Long*, 5 Co. Rep. 122, a; 1 East, P. C. 342. It must also be stated upon what part of the body the deceased was struck; 2 Hale, P. C. 185; and the length and depth of the wound must be shewn; id. 186; *Haydon's case*, 4 Co. Rep. 42, a. Where there are several wounds, the length and breadth of each need not be stated; *Rex v. Mosley*, R. & M. C. C. 97. And see *Young's case*, 4 Co. Rep. 40; *Walker's case*, id. 41; *Rex v. Lorkin*, 1 Bulstr. 124; 2 Hale, P. C. 184; *Rex v. Dale*, R. & M. C. C. 5; as to the wound, cause of death, &c. Where the death proceeded from suffocation from the swelling up of the passage of the throat, and such swelling proceeded from wounds occasioned by forcing something into the throat; it was held sufficient to state in the indictment, that the things were forced into the throat, and the person thereby suffocated; and that the process imme-

Of all species of deaths, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought (*f*). And therefore, by the statute 22 Hen. III. c. 9, it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death (34): but this act did not live long, being repealed by 1 Edw. VI. c. 12 (35). There was also, by the ancient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder,

(*f*) 3 Inst. 48.

diately causing the suffocation, namely, the swelling, need not be stated; *Rex v. Tye*, R. & R. C. C. 345; and see *Rex v. Edwards*, 6 C. & P. 401. The death, *by the means stated*, must be positively averred, and cannot be inferred; 1 East, P. C. 343: and where the death is occasioned by a stroke, it must be further alleged that the prisoner gave the deceased a *mortal* wound, &c. whereof he died; 2 Hale, P. C. 186; Kel. 125; *Lad's case*, Leach, 96. The time and place both of the wound and of the death, must be stated, in order to shew that the deceased died within a year and a day from the cause of the death; in computing which, the day of the act done, is reckoned the first: though a precise statement of the day is immaterial, if the party is proved to have died within the limited period; 2 Inst. 318; 2 East, P. C. 344. The word *murdered* is absolutely necessary in the indictment; 2 Hale, P. C. 187. The allegations, "not having the fear of God," &c. "vi et armis," and "being in the peace of God," &c. are not *necessary*; 2 Stark. C. P. 385. Where the stroke is given in one county, and the death happens in another, the venue may be laid in either. As to laying the venue, where the stroke is given at sea, see 9 G. IV. c. 31, § 8. Where the name of the deceased is

not known, he may be described as a certain person to the jurors unknown; but a bastard child cannot be described by his mother's name, unless he has acquired that name by reputation; *Rex v. Clarke*, R. & R. C. C. 358; and see *Rex v. Sheen*, 2 C. & P. 655.

(34) This extraordinary punishment seems to have been adopted by the legislature, from the peculiar circumstances of the crime, which gave rise to it; for the preamble of the statute informs us, that John Roose, a cook, had been lately convicted of throwing poison into a large pot of broth, prepared for the bishop of Rochester's family, and for the poor of the parish; and the said John Roose was by a retrospective clause of the same statute ordered to be boiled to death. Lord Coke mentions several instances of persons suffering this horrid punishment; 3 Inst. 48. Murder of malice prepense, was made high treason in Ireland, by 10 Henry VII. c. 21; *Irish Statutes*.—CH.

(35) Sections 10 and 14 of 1 E. VI. c. 12, relating to housebreaking, robbing, horse-stealing, sacrilege, and benefit of clergy, were repealed by 7 & 8 Geo. IV. c. 27; and ss. 13, 16, & 22, relating to petit treason, murder, and bigamy, by 9 Geo. IV. c. 31.

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for many ages past (*g*): I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed (*h*). The Gothic laws punished in this case, both the judge, the witnesses and the prosecutor: "*peculiari poenâ judicem puniunt; peculiari testes, quorum fides judicem seduxit; peculiari denique et maxima auctorem, ut homicidam* (*i*) (36)." And, among the Romans, the *lex Cornelia de sicariis*, punished the false witness with death, as being guilty of a species of assassination (*k*). And there is no doubt but this is equally murder *in foro conscientiæ* as *killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such (37). If a man, however, does such an act, of which the probable conse-

(*g*) Fost. 132. In the case of Macdaniel and Berry, reported by Sir Michael Foster, though the then attorney general declined to argue this point of law, I have good grounds to believe it was not from any apprehension of his that the point was not maintainable,

but from other prudential reasons. Nothing therefore should be concluded from the waving of that prosecution.*

(*h*) Mirror, c. 1, § 9; Brit. c. 52. Bracton, l. 3. c. 4.

(*i*) Stiern. de jure Goth. l. 3, c. 3.

(*k*) Ff. 48, 8, 1.

(36) They visit the judge with one punishment; the witnesses, whose testimony seduced the judge, with another; and the author, as a homicide, with another and heavier punishment.

(37) The guilt of him, who takes away the life of an innocent man by a false oath, is much more atrocious than that of an assassin, who murders by poison or a dagger. He, who destroys by perjury, adds to the privation of life public ignominy, the most excruciating of tortures to an honourable mind, and reduces an innocent family to ruin and infamy; but notwithstanding this is the most horrid of all crimes,

yet there is no modern authority to induce us to think that it is murder by the law of England. Lord Coke says expressly "it is not holden for murder at this day;" 3 Inst. 48; see also Fost. 132. Such a distinction in perjury would be more dangerous to society and more repugnant to principles of sound policy, than in this instance the apparent want of severity in the law. Few honest witnesses would venture to give evidence against a prisoner tried for his life, if thereby they made themselves liable to be prosecuted as murderers.—CH.

* But it is stated as the result of that case, to have been held that a person cannot be indicted for murder in procuring another to be executed by

falsely charging him with a crime of which he was innocent; 1 Leach, 44 1 East, P. C. 333.

quence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died (*l*); of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it (*m*); and of the parish officers, who shifted a child from parish to parish, who died from want of care and sustenance (*n*) (38) (39). So too, if a man hath a beast that is used to do mischief; and he, knowing it, *suffers* it to go abroad, and it kills a man; even this is manslaughter in the owner: but if he had purposely *turned it loose*, though barely to frighten people and make what is called sport, it is with us, as in the Jewish law, as much murder, as if he had incited a bear or dog to worry them (*o*) (40). If a physician

(*l*) 1 Hawk. P. C. 78.

(*m*) 1 Hal. P. C. 432.

(*n*) Palm. 545.

(*o*) Ibid. 431.

(38) Or if a master refuses his apprentice necessary food or sustenance, or treats him with such continued harshness and severity as his death is occasioned thereby, the law will imply malice, and the offence will be murder; *Leach*, 127.—CH.

(39) So, in a recent case, a man was convicted of murder in causing the death of his apprentice, by not providing him with sufficient food and nourishment, without reference to other acts of cruelty committed by the prisoner towards the deceased; *Rex v. Squire*, 1 Russell, 246. So it is clearly an indictable, though a subordinate offence, to refuse or neglect to supply necessaries to a child, servant, or apprentice, whom a person is bound by duty or contract to provide for, if such child, &c. be of tender years, and unable to provide for itself; *Rex v. Friend*, R. & R. C. C. 20. So, likewise, with respect to a servant; *Rex v. Ridley*, 2 Camp. 650. An overseer is not indictable for not relieving a pauper, unless there be an order for his relief, except in case of immediate urgency, where there is not time to get an order; *Rex v. Meredith*, id. 46.

But on an indictment charging that the overseer had under his care a poor person, and neglected or refused to provide him with necessary food, &c. for want of which he died, the overseer was convicted; *Rex v. Booth*, id. 47, n. And in *Rex v. Warren*, id. 48, n. which was an indictment against an overseer for neglecting to supply medical assistance to a pauper dangerously ill, the offence was held to be sufficiently made out, though it was neither charged nor proved that the person was in the workhouse, nor had, before his illness, received or needed parish relief. There is no legal obligation on one brother to maintain another, so as to make the omission indictable; *Rex v. Smith*, 2 C. & P. 449. If one has his idiot brother, who is helpless, as an inmate in his house, and omits to supply him with proper food, warmth, &c.; *semble*, that he is not indictable for the omission; *Id. ibid.* And held that evidence of this will not support an indictment for assault or imprisonment; *Id. ibid.*

(40) See 2 Hawk. P. C. c. 13. § 8; *Blackman v. Simmons*, 2 C. & P. 140; ante 183, note (11).

or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been in a civil action for neglect or ignorance (*p*): but it hath been holden, that if it be not a *regular* physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least (*q*) (41). Yet Sir Matthew Hale very justly questions the law of this determination (*r*). In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first (*s*).

and the person killed must be "a reasonable creature, in being, and in the king's peace."

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Further; the person killed must be "*a reasonable creature, in being, and under the king's peace,*" at the time of the *killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman; except he be an alien enemy in time of war (*t*). To kill a child in its mother's womb, is now no murder, but a great misprision (42); but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them (*u*) (43). But, as there is one case where

(*p*) *Mirr. c. 4, § 16.* See Vol. III. page 122.

(*q*) *Britt. c. 5; 4 Inst. 251.*

(*r*) *1 Hal. P. C. 430.*

(*s*) *1 Hawk. P. C. 79.*

(*t*) *3 Inst. 50; 1 Hal. P. C. 433.*

(*u*) *3 Inst. 50; 1 Hawk. P. C. 80.*
But see *1 Hal. P. C. 433.*

(41) Such persons are clearly still liable to a civil action, where gross negligence or ignorance can be proved; *Slater v. Baker*, 2 Wills. 359; *Seare v. Prentice*, 8 East, 348; and it would also be a good defence to an action by an apothecary on his bill, that he had treated his patient ignorantly or improperly; *Kannea v. M'Mullen*, Peake 59. And where a person, undertaking the cure of a disease, (whether he has received a medical education, or not,) is guilty of gross negligence in attending his patient after he has applied a remedy, or of gross rashness in

the application of it, and death ensues in consequence of either, he is guilty of manslaughter; *Rex v. St. John Long*, 4 C. & P. 423. And see other cases, S. P. 1 Har. Dig. 740, 741.

(42) Where an unskilful practitioner wounded the head of a child before the child was perfectly born, and the child was afterwards born alive, but subsequently died of this injury, it was held manslaughter, although the child was in its mother's womb at the time when the wound was given; *Rex v. Senior*, M. C. C. 344; and see note (44) post.

(43) To justify a conviction on an

it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. I. c. 27, that if any woman be delivered of a child which if born alive should by law be a bastard; and endeavours privately to conceal its death, by burying the child or the like; the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead. This law which savours pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French (*v*): but I apprehend it has of late years been usual with us in England, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption, that the child whose death is concealed, was therefore killed by its parent, is admitted to convict the prisoner (44).

(*v*) See Barrington on the Statutes, 425.

indictment charging a woman with the wilful murder of a child "of which she was delivered, and which was born alive," the jury must be satisfied affirmatively that the whole body was brought alive into the world; it is not sufficient that the child had breathed in the progress of the birth; *Rex v. Poulton*, 5 C. & P. 329.

If a child has breathed before it is born, this is not sufficiently life to make the killing of the child murder. There must be an independent circulation in the child, or the child cannot be considered as alive for this purpose; *Rex v. Enoch*, 5 C. & P. 539.

A child must be actually wholly in the world, in a living state, to be the subject of a charge of murder; but if it is wholly born, and is alive, it is not essential that it should have breathed; *Rex v. Brain*, 6 C. & P. 349; and see the next note.

(44) The 21 J. I. c. 27, was re-

pealed by the 43 G. III. c. 58, which has also recently been repealed, and the law upon this subject is now as follows: by 9 Geo. IV. c. 31, § 13, if any person with intent to procure the miscarriage of any woman then being quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any poison or other noxious thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person with intent to procure the miscarriage of any woman not being, or not being proved to be, then quick with child, unlawfully and maliciously shall administer to her, or cause to be taken by her, any medicine or other thing, or shall use any instrument or other means whatever with the

The killing must
be done with
malice pre-

Lastly, the killing must be committed *with malice aforethought*, to make it the crime of murder. This is the grand

like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be transported for any term not exceeding fourteen, and not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years, and if a male, to be once, twice, or thrice publicly or privately whipped. By § 14, if any woman shall be delivered of a child, and shall, by secretly burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: provided, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence, as if she had been convicted upon an indictment for the concealment of the birth. These enactments are substantially the same as those of the 43 Geo. III. c. 58, upon the same subjects, except that by section 14 of the new Act, the concealment of the birth of a child is made an indictable misdemeanor, whereas, before, the prisoner could only be found guilty of the concealment upon an indictment charging her with murder; See *Rex v. Parkinson*, 1 Russell, 475,

n.; 1 Chit. Burn, 334. The rules laid down with respect to indictments for these offences under the old statute, seem, in other respects, equally applicable to the new Act; and are therefore subjoined.

“To support an indictment, where the woman was quick with child, it must be proved; first, that the prisoner administered to, or caused to be taken by the woman, the drug, &c. mentioned in the indictment; but it seems that proof of any other substance or thing, ejusdem generis, will be sufficient; *Rex v. Phillips*, 3 Camp. 74. It will not be sufficient, however, that the prisoner merely imagined that it would have the effect intended, as in a case where the woman was *not* quick with child, but it must also appear that the drug administered was either a poison or some other noxious thing. Secondly it must be proved that the drug was administered with intent to procure miscarriage. Whether it were in fact a drug likely or calculated to produce that effect seems to be immaterial, provided the intent be proved. Thirdly, it must be proved that the woman was quick with child at the time of the offence committed. In a case where the woman herself gave evidence, and swore that she had not felt the child alive within her; *Lawrence, J.*, held, that this evidence took the case out of the statute, although the witness also swore that she was in the fourth month of her pregnancy, and medical persons proved that the child is usually alive at that period; *Rex v. Phillips*, 3 Camp. 77.”

“To support an indictment where the woman was *not* quick with child, it must be proved that the prisoner administered to, or caused to be taken by the woman, a drug or mixture of some kind, and that he did this with

criterion which now distinguishes murder from other killing : and this malice prepense, *malitia precogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general: the dictate of a wicked, depraved, and malignant heart (*w*); *un disposition à faire un mal chose* (*x*); and it may be either *express* or *implied* in law. Express *malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily

pense; malice may be *express*, or, *implied*; *express* malice includes duelling;

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(*w*) Foster, 256.

(*x*) 2 Roll. Rep. 461.

intent to procure her miscarriage. It is immaterial whether in fact the drug or other thing administered were likely or calculated to produce abortion, or whether the woman was with child at the time, or not; it is sufficient to prove that the prisoner, imagining her to be with child, administered the drug, &c. with intent to procure miscarriage; *Rex v. Phillips*, 3 Camp. 74. Where the indictment charged the prisoner with having administered a *decoction* of savin, proof that he administered an *infusion* of savin, was held to maintain the indictment; *Id.* If it turns out in evidence, that the woman *was* quick with child, at the time the drug, &c. was administered, it should seem that the prisoner must be acquitted; for this part of the Act extends expressly only to cases where the drug is administered to women "not being, or not being proved to be, quick with child at the time." Archb. C. P., title *Causing Abortion*.

It has, however, been recently decided that, on an indictment for administering a drug to a woman to procure abortion, "she being with child, but not quick with child," if it appears that the woman was not with child at all, the prisoner must be acquitted;

although it appears that the prisoner believed her to be with child, and gave her the drug with intent to destroy the child; *Rex v. Scudder*, R. & M. C. C. 216.

As § 13 of the new statute makes it a capital felony to use any *instrument or other means* with intent to procure the miscarriage of a woman quick with child, the crime it seems will be complete, if the intent be felonious, whether the instrument or other means be dangerous or not. The expression "quick with child" means, when the woman has felt the child move within her; *Rex v. Phillips*, 3 Camp. 77.

It has been held, with reference to the former statute, that upon a trial on the coroner's inquest for the murder of a bastard child, a woman may be found guilty of concealment of the birth; *Rex v. Maynard*, R. & R. C. C. 386; *Rex v. Cole*, 3 Camp. 371. And that a woman may be found guilty of such concealment, though from appearances it was probable the child was still-born, and though the birth was probably known to an accomplice; *Rex v. Cornwall*, R. & R. C. C. 336. Aliter, if she has made known her pregnancy to a person not an accomplice, and has made preparations for her confinement;

harm (*y*) (45). This takes in the case of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty as gentlemen, and claiming it as their right, to wanton with their own lives and those of their fellow-creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has justly fixed the crime and punishment of murder, on them, and on their seconds also (*z*) (46). Yet it requires such a degree of passive valour to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe, that the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the person insulted, as of

(*y*) 1 Hal. P. C. 451.

(*z*) 1 Hawk. P. C. 82.

Rex v. Southern, 1 Russell, 476. And the presence of an accomplice has been held to take the case out of the statute of 21 J. I. c. 27, on a prosecution for concealment; *Rex v. Peat*, 1 East, P. C. 229.

(45) It is the province of the judge, in a trial for murder, to decide whether the facts proved, if true, amount in law to malice, and of the jury to decide, whether those facts are true, and to find a verdict accordingly; and when they find a special verdict, they are not to express any opinion as to the malice, but merely to state the facts; *Rex v. Oneby*, 2 Ld. Raymd. 1485; *Hazell's case*, 1 Leach, 383; Fost. 257.

(46) Wherever two persons in cold blood meet and fight, on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot excuse himself by alleging that he was

first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that his only intent was to vindicate his reputation; or that he meant not to kill, but only to disarm his adversary: for, as he deliberately engaged in an act in defiance of the law, he must at his peril abide the consequences; 1 Hawk. P. C. c. 31, § 21; 1 Bulstr. 86, 7; 2 Bulstr. 147; Crom. 22, 6; 1 Rol. Rep. 360; 3 Bulstr. 171; 1 Hale, P. C. 48. Therefore, if two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning, and agree to fight in the afternoon, or such a considerable time after, by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder; 1 Hawk. P. C. c. 31, § 22; 3 Inst. 51; 1 Hale, P. C. 48; Kel. 56; 1 Lev. 180.

him who hath given the insult. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy that was stealing wood to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died: these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter (a) (47). Neither shall he be guilty of a less crime, who kills another in *consequence of such a wilful act as shews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do mischief (b), upon a horse used to strike, or coolly discharging a gun among a multitude of people (c). So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequences might be bloodshed, as to beat a man, to commit a riot (48), or to rob a park (49): and

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(a) 1 Hal. P. C. 454, 473, 474.

(c) 1 Hawk. P. C. 74.

(b) Lord Raym. 143.

(47) It has been laid down, that where death proceeds from the passive negligence or active severity of a master, the offence is murder; *Rex v. Self*, 1 Leach, 137. And, with respect to parents and children, masters and scholars, &c., if the correction exceed the bounds of moderation, either in the measure of it, or in the instrument made use of, it will be either murder or manslaughter according to the circumstances of the case; if with a weapon not likely to kill, though improperly used, manslaughter; if with a weapon likely to kill, regard being had to the age and strength of the party, murder; Fost. 262. Moreover, it is not material that the means used to perpetrate the crime had no immediate effect, or would

not have been capable in all cases of producing the same effect. Therefore, it is murder in a gaoler to confine a prisoner in a damp unwholesome room, without allowing him the common conveniences which the decencies of nature require, by which his constitution is so affected as to produce a distemper of which he dies; *Rex v. Huggins*, 2 Ld. Raym. 1578. And it is an indictable offence wilfully and maliciously to supply prisoners of war with unwholesome food, and not fit to be eaten by man; *Rex v. Treeve*, 2 East, P. C. 821.

(48) As to the case of killing a man in an *affray*, and whether under the circumstances it amounted to murder; see *Rex v. Rankin*, R. & R. C. C. 43.

(49) See *Rex v. Edmeads*, 3 C. &

one of them kills a man ; it is murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand (*d*) (50).

the law pre-
sumes malice
unless the con-
trary is proved ;

Also in many cases where no malice is expressed, the law will imply it : as where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can be proved (*e*). And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice ; for no person unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another (*f*). But if the person so provoked had unfortunately killed the other, by beating him in such a manner, as shewed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behaviour, as to adjudge it only manslaughter, and not murder (*g*) (51). In like manner if one kills an officer of justice,

(*d*) 1 Hawk. P. C. 84.

P. C. 455, 456.

(*e*) 1 Hal. P. C. 455.

(*g*) Fost. 291.

(*f*) 1 Hawk. P. C. 82. 1 Hal.

P. 390 ; *Rex v. Whithorne*, Id. 394 ; Fost. 351, 355 ; 1 Hale, P. C. 442, 445 ; *ante*, 180, notes (4) and (5).

(50) See further as to the meaning of malice ; 1 Russell, 422, n. ; Fost. 256.

(51) Where the resentment bears no proportion to the insult, the crime will be murder ; 1 Russell, 436. Therefore, no breach of word or promise, no trespass to lands or goods, no affront by bare words or gestures, will free the party killing from the guilt of murder, if it appear that his intention was to kill ; which intention may be inferred from the degree of ferocity expressed, or the kind of weapon used ; and the use of a deadly weapon seems to be conclusive evidence of such intention ; 2 Hawk. P. C. c. 13, §§ 33, 34 ; Fost. 290 ; Kel. 55, 130, 131 ; 1 East, P. C. 233 ; 1 Russell, 435. Even blows, previously received, will not

extenuate the offence, where it is committed from motives of malice or revenge ; particularly where the provocation appears to have been sought for, as a pretext or colour for the revenge. Therefore, where in consequence of a quarrel in a cudgel-play, a battle with fists took place between the prisoner and the deceased, and continued till the parties were separated, and the prisoner then quitted the room in anger, and, upon getting into the street, threatened, with an oath, that he "would fetch something and run him (the deceased) through the body," and soon afterwards returned in a thicker coat, and stood near the door with a cudgel in his hand, apparently for the purpose of renewing the cudgel-fight, but with a deadly weapon concealed under his coat, and then artfully drew on a discourse on the past quarrel, and, on the deceased striking him once or

either civil or criminal, in the execution of his duty, or any of his assistants endeavouring to conserve the peace, or any private person endeavouring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder (*h*) (52). And if one intends to do another felony, *and undesignedly kills a man, this is also murder (*i*). Thus if one shoots at A. and misses *him*, but kills B., this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A.; and B., against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder (*j*). So also if one give a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it (*k*). It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly, malicious: these therefore may suffice as a specimen; and we may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where *justified* by the command or permission of the law; *excused* on the account of accident or self-preservation; or *alleviated* into manslaughter, by being either the involuntary consequence of some act, not strictly lawful, or, if voluntary, occasioned by some sudden and sufficiently violent provocation (53). And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former how far they extend to take away or mitigate the guilt. For all ho-

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(*h*) 1 Hal. P. C. 457. Foster, 308, &c.

(*i*) 1 Hal. P. C. 465.

(*j*) Ibid. 466.

(*k*) Ibid. 429.

twice with a cudgel, in order to renew the engagement, immediately dropped his own cudgel, and stabbed the deceased to the heart: the offence, from the many circumstances of deliberate malice and deep revenge, was clearly held to be murder; *Mason's case*, 1 East, P. C. 239.

(52) It is murder to kill a constable, though he has no warrant, and does not witness the felony committed, but takes the party upon a charge only; and that, even though the charge be in itself defective to constitute a felony; *Rex v. Ford*, R. & R. C. C. 329.

(53) See the notes, *ante*, 180 to 190.

micide is presumed to be malicious, until the contrary appeareth upon evidence (*l*) (54).

the punishment of murder and manslaughter formerly the same, but now different;

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The punishment of murder, and that of manslaughter, were formerly one and the same; both having the benefit of clergy; so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime (*m*). But now, by several statutes (*n*), the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. In atrocious cases, it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place *where the fact was committed: but this was no part of the legal judgment; and the like is still sometimes practised in the case of notorious thieves. This being quite contrary to the express command of the mosaical law (*o*), seems to have been borrowed from the civil law: which, besides the terror of the example, gives also another reason for this practice, viz. that it is a comfortable sight to the relations and friends of the deceased (*p*). But now in England, it is enacted by sta-

(*l*) Fost. 255.

(*m*) 1 Hal. P. C. 450.

(*n*) 23 Hen. VIII. c. 1; 1 Edw. VI. c. 12; 4 & 5 Ph. & M. c. 4.

(*o*) "The body of a malefactor shall not remain all night upon the tree; but thou shalt in anywise bury him that day, that the land be not defiled." Deut. xxi. 23.

(*p*) "*Famosus latrones, in his locis, ubi grassati sunt, furca figendos placuit; ut, et conspectu deterreantur alii, et solatio sit cognatis interemptorum,*

eodem loco pœna reddita, in quo latrones homicidia fecissent." Ff. 48, 19, 28, § 15.—"It decreed that murderers should be empaled on the spot where they had committed the murder; both that others might by that exhibition be deterred from crime, and that it might afford consolation to the relatives of the murdered party, to find that the punishment was inflicted on the same spot where the crime had been committed."

(54) Francis Smith was indicted for murder at the Old Bailey, January 13th, 1804.

The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost. The prisoner went out with a loaded gun with intent to apprehend the person who personated the ghost; he met the deceased, who was dressed in white, and immediately discharged his gun, and killed him. Chief Baron Macdonald, Mr. J. Rooke, and Mr. J. Lawrence, were unanimously of opinion that the facts amounted to the

crime of murder. For the person who represented the ghost, was only guilty of a misdemeanor, (a nuisance,) and no one would have had a right to have killed him, even if he could not otherwise have been taken.

The jury brought in a verdict of manslaughter, but the court said they could not receive that verdict; if the jury believed the witnesses, the prisoner was guilty of murder; if they did not believe them, they must acquit. Upon this they found a verdict of guilty.

tute 25 Geo. II. c. 37, that the judge, before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall, in passing sentence, direct him to be executed on the next day but one, unless the same shall be Sunday, and then on the Monday following, and that his body be delivered to the surgeons to be dissected and anatomized (*q*); and that the judge may direct his body to be afterwards hung in chains, but in nowise to be buried without dissection. And, during the short but awful interval between sentence and execution, the prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge, upon good and sufficient cause, to respite the execution, and to relax the other restraints of this act (55).

(*q*) Fost. 107.

Sentence of death was pronounced, but the prisoner was reprieved.—CH.

(55) The 25 Geo. II. c. 37, is repealed by the 9 Geo. IV. c. 31, with the exception of two sections, 9 & 10; the former of which enacts, that if any person shall by force set at liberty or rescue, or attempt to rescue or set at liberty, any person out of prison, who shall be committed for, or found guilty of murder; or rescue, or attempt to rescue, any person convicted of murder, going to execution, or during execution; every person so offending shall be deemed guilty of felony, and shall suffer death; and the latter, that if any person shall, after such execution had, by force rescue, or attempt to rescue, the body of such offender out of the custody of the sheriff or his officers, or from the company of surgeons, or their officers, or servants, or from the house of any surgeon where the same shall have been deposited; every person so offending shall be deemed guilty of felony, and shall be liable to be transported for the term of seven years. The 9 Geo. IV. c. 31, § 3, enacts, that every person convicted of murder, or of being an accessory before the fact to murder,

shall suffer death as a felon; and every accessory after the fact to murder, shall be liable, at the discretion of the court, to be transported for life, or to be imprisoned, with or without hard labour, for any term not exceeding four years.

Section 4 enacts, that every person convicted of murder shall be executed according to law on the day next but one after that on which the sentence shall be passed, unless the same shall happen to be Sunday, and in that case on the Monday following; and the body of every murderer shall, after execution, either be dissected or hung in chains, as to the court shall seem meet; and sentence shall be pronounced immediately after the conviction of every murderer, unless the court shall see reasonable cause for postponing the same; and such sentence shall express not only the usual judgment of death, but also the time hereby appointed for the execution thereof, and that the body of the offender shall be dissected or hung in chains, whichever of the two the court shall order: provided, that after such sentence shall have been pronounced, it shall be lawful for the court

parricide, by the English law, a

By the Roman law, *parricide*, or the murder of one's parents or children, was punished in a much severer manner

or judge to stay the execution thereof, if such court or judge shall so think fit.

Sect. 5 enacts, that whenever dissection shall be ordered by such sentence, the body of the murderer, if executed in Middlesex or London, shall be immediately conveyed by the sheriff or his officers to the Hall of the Surgeons' Company, or to such other place as the said company shall appoint, and shall be delivered to such person as the said company shall appoint, for the purpose of being dissected; and the body of the murderer, if executed elsewhere, shall in like manner be delivered to such surgeon as the court or judge shall direct, for the same purpose.

And now by statute 2 & 3 W. IV. c. 75, § 16, reciting 9 G. IV. c. 31, it is enacted, that so much of the said recited Act as authorises the court, if it shall see fit, to direct that the body of a person convicted of murder shall, after execution, be dissected, be repealed, and that in every case of conviction of any prisoner for murder, the court before whom such prisoner shall have been tried shall direct such prisoner either to be hung in chains, or to be buried within the precincts of the prison in which such prisoner shall have been confined after conviction, as to such court shall seem meet, and that the sentence to be pronounced by the court shall express that the body of such prisoner shall be hung in chains, or buried within the precincts of the prison, whichever of the two the court shall order.

By 9 G. IV. c. 31, § 6, every person convicted of murder shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners, and shall be fed with bread and water only, and with no other food or liquor, except in case of receiving the sacrament, or in case of any sickness or wound, in which case the sur-

geon of the prison may order other necessities to be administered; and no person but the gaoler and his servants, and the chaplain and surgeon of the prison, shall have access to any such convict, without the permission in writing of the court or judge before whom such convict shall have been tried, or of the sheriff or his deputy: provided, that in case the court or judge shall think fit to respite the execution of such convict, such court or judge may, by a licence in writing, relax, during the period of the respite, all or any of the restraints or regulations hereinbefore directed to be observed.

As to rescue generally, see *ante*, 131, 2, both in text and notes.

As to accessories generally, both before and after the fact, see *ante*, 34 to 40, both in text and notes. As to accessories in murder, see 1 Russell, 431. If a person charged as principal is acquitted, a conviction of another, charged in the indictment as being present, aiding and abetting, is good; *Id.* Whether the award of dissection was an essential part of the sentence to be pronounced by the judge upon a convicted murderer, seems to have been considered doubtful; but the omission of it was held to be curable by the judge going again into court after adjournment, and passing a fresh sentence; *Rex v. Fletcher*, R. & R. C. C. 60. It is not essential to award the day of execution in the sentence, the statute in that respect being merely directory; and if a wrong day is awarded, it will not vitiate the sentence, if the mistake is discovered and set right during the assizes: and notwithstanding the statute, the judge may, if he sees fit, order a person convicted of murder to be executed immediately, or at any time within forty-eight hours after conviction, as in any other capital felony; *Rex v. Wyatt*, *Id.* 230. And

than any other kind of homicide. After being scourged, the delinquents were sewed up in a leathern sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea (*r*). Solon, it is true, in his laws, made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity (*s*). And the Persians, according to Herodotus, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, we must account for *the omission of an exemplary punishment for this crime in our English laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parent (*t*).

simple murder, unless the child be servant to the parent;

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For, though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates it a new offence, no less than a species of treason, called *parva proditio*, or *petit treason*: which however is nothing else but an aggravated degree of murder (*u*); although on account of the violation of private allegiance, it is stigmatized as an inferior species of treason (*v*). And thus, in the ancient Gothic constitution, we find the breach both of natural and civil relations, ranked in the same class with crimes against the state and the sovereign (*w*).

petit treason an aggravated degree of murder;

Petit treason, according to the statute 25 Edw. III. c. 2, may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person, either secular or regular, his superior, to whom he owes faith and obedience. A servant who kills his master, whom he has left, upon a

must be proved by two witnesses.

(*r*) Ff. 48, 9, 9.

(*s*) Cic. pro. S. Roscio, § 25.

(*t*) 1 Hal. P. C. 380.

(*u*) Foster, 107, 324, 336.

(*v*) See page 75.

(*w*) "*Omnium gravissima censetur vis facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores (et vice versâ,) servis in dominos, aut etiam ab homine in semet ipsum.*"

Stiernh. de jure Goth. l. 3, c. 3.—

"The most aggravated of all acts of violence seem to be those which are committed by natives against their country, subjects against their king, children against their parents, husbands against their wives, (and vice versâ,) servants against their masters, or even by a man against himself."

see *Atkinson v. Rex* (in error), 3 Bro. P. C. 517. A peer convicted of murder ought to receive judgment according to the provisions of the statute; *Earl Ferrers' case*, Fost. 138. As to

the admissibility in evidence, in cases of murder and manslaughter, of the depositions and dying declarations of parties deceased, see post, 214, 359, in notis.

grudge conceived against him during his service, is guilty of petit treason: for the traitorous intention was hatched while the relation subsisted between them; and this is only an execution of that intention (*x*). So if a wife be divorced *a mensâ et thoro*, still the *vinculum matrimonii* subsists; and if she kills such divorced husband, she is a traitress (*y*). And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these is petit treason (*z*). As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in *its most odious degree: except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of William III (*a*). But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder (*b*): and in such case it should seem that *two* witnesses are not necessary, as in case of petit treason they are. Which crime is also distinguished from murder in its punishment (56).

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its punishment
derived from the
Druids.

The punishment of petit treason, in a man, is to be drawn and hanged, and in a woman to be drawn and burnt (*c*): the idea of which latter punishment seems to have been handed down to us by the laws of the ancient Druids, which condemned a woman to be burnt for murdering her husband (*d*); and it is now the usual punishment for all sorts of treasons committed by those of the female sex (*e*). Persons guilty of petit treason were first debarred the benefit of clergy, by statute 12 Hen. VII. c. 7, which has been since extended to their aiders, abettors, and counsellors, by statute 23 Hen. VIII. c. 1, and 4 and 5 P. and M. c. 4 (57).

(*x*) 1 Hawk. P. C. 89; 1 Hal. P. C. 380.

(*y*) 1 Hal. P. C. 381,

(*z*) Ibid.

(*a*) Fost. 337.

(*b*) Foster, 106; 1 Hal. P. C. 378; 2 Hal. P. C. 184.

(*c*) 1 Hal. P. C. 382; 3 Inst. 311.

(*d*) Cæsar de bell. Gall. l. 6, c. 18.

(*e*) See page 93.

(56) But now, by 9 Geo. IV, c. 31, § 2, every offence which before the commencement of that Act would have amounted to petit treason, is to be

deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessaries, are to be dealt

with, indicted, tried and punished as principals and accessories in murder; Vide ante 93 note (21), 75 note (1), 16 note (10).

(57) With respect to accessories, the statute 9 G. IV. c. 31, § 31, contains these enactments; that every accessory before the fact to any felony punishable under that Act, for whom no punishment has been therein before provided, shall be liable, at the discretion of the court, to be transported for any term not exceeding fourteen, nor less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years; and that

every accessory after the fact to any felony punishable under that Act (except murder) shall be liable to be imprisoned, with or without hard labour, for any term not exceeding two years; and that every person who shall counsel, aid, or abet the commission of any *misdemeanor* punishable under that Act, shall be liable to be proceeded against and punished as a principal offender. The latter provision is new, it having been previously always considered that there could be no accessories, either before or after the fact, in cases of *misdemeanor*; Vide ante, 36, in the text.

CHAPTER XV.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

Other crimes affecting the persons of individuals, are,

felonious, and in their nature capital; and misdemeanors.

I. Felonious, as, mayhem,

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anciently punished by the lex talionis,

HAVING in the preceding chapter considered the principal crime, or public wrong, that can be committed against a private subject, namely, by destroying his life; I proceed now to inquire into such other crimes and misdemeanors, as more peculiarly affect the security of his person, while living.

Of these some are felonious, and in their nature capital; others are simple misdemeanors, and punishable with a lighter animadversion. Of the felonies the first is that of *mayhem*.

I. Mayhem, *mayhemium*, was in part considered in the preceding volume (a), as a civil injury: but it is also looked upon in a criminal light by the law, being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary (b) (1). And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to *be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

By the ancient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose

(a) See vol. III. page 121.

(b) Brit. l. 1, c. 25; 1 Hawk. P. C. 111.

(1) A party who maims himself, or procures another to do it for him, so that he may be the better enabled to beg, or to prevent himself from being pressed for a soldier, is liable to fine or

imprisonment at common law; *Rex v. Wright*, 1 East, P. C. 396. So is the party by whom it is effected at the other's desire; *Id.*

the like part; *membrum pro membro* (c); which is still the law in Sweden (d). But this went afterwards out of use: partly because the law of retaliation, as was formerly shewn (e), is at best an inadequate rule of punishment; and partly because upon a repetition of the offence the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment (f); unless perhaps the offence of mayhem by castration, which all our old writers held to be felony: "*et sequitur aliquando pœna capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione* (g) (2)." And this, although the mayhem was committed upon the highest provocation (h).

But subsequent statutes have put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Hen. IV. c. 5, to remedy a mischief that then prevailed of beating, wounding, or robbing a man, and then cutting out his *tongue*, or putting out his *eyes*, to prevent him from being an evidence against them, this offence is declared to be felony, if done of malice prepense; that is, as Sir Edward Coke (i) explains it, voluntarily, and of set purpose, though done upon a sudden occasion. Next, in order of time, is the statute 37 Hen. VIII. c. 6, which directs, that if a man shall maliciously and unlawfully cut off the *ear* of any of the *king's subjects, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction; but also 10*l.* by way of fine to the king, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is

and afterwards
as a capital
felony;

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(c) 3 Inst. 118.—*Mes, si la pleynte soit faite de femme qu'avera tolle a home ses membres, en tiel case perdra la feme la une meyn par jugement, come le membre dount ele avera trespasse.* (Brit. c. 25.)—"But if the complaint be made of a woman who has (thus) mutilated a man, in such case she shall lose a hand, as the member with which she committed the offence."

(d) Stiernhook de jure Sueon, l. 3, t. 3.

(e) See page 12.

(f) 1 Hawk. P. C. 112.

(g) Bract. fol. 144.

(h) Sir Edward Coke (3 Inst. 62,) has transcribed a record of Henry the third's time, (Claus. 13 Hen. III. m. 9,) by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.

(i) 3 Inst. 62.

(2) And it is followed sometimes by capital punishment, sometimes by

banishment for life, with the forfeiture of all property.

that of 22 and 23 Car. II. c. 1, called the Coventry Act; being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as was supposed, for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or to disfigure him*; such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy (k) (3).

(k) On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact, of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedge-bill; but he recovered. Now the bare intent to murder is no felony; but to disfigure with an intent to disfigure, is made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an

intent to disfigure, but with an intent to murder; and therefore not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge-bill, which cannot but endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him, he may be indicted on this statute; and it shall be left to the jury whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder, and they were both condemned and executed. (State Trials, VI. 212.)

(3) These statutes are now all repealed. "So much of the 5 H. IV. c. 5, as relates to cutting the tongues or putting out the eyes of any of the king's liege people, and to any assault upon the servant of a knight of the shire in parliament," by the 9 Geo. IV. c. 31; the 37 H. VIII. c. 6, wholly, by the 7 & 8 Geo. IV. c. 27; and the 22 & 23 C. II. c. 1, wholly, by the 9 G. IV. c. 31: and the old law with respect to mayhem is now merged in the last-mentioned statute, ss. 11 and 12 of which provide ample remedies for that offence. See those clauses, and the cases bearing upon them, set out in full, *ante*, 194, note (28).

There are, however, two species of maiming not included in the 9 Geo. IV. c. 31, it having been previously found necessary to make them the subjects of distinct enactments; namely, injuries done to the persons of individuals, by means of wanton or furious driving, and by means of spring-guns and man-traps.

By the 1 Geo. IV. c. 4, it is enacted, that if any person whatever shall be *maimed or otherwise injured* by reason of the wanton and furious driving or racing, or by the wilful misconduct of any coachman or other person having the charge of any stage-coach or public carriage, such wanton or furious

Thus much for the felony of mayhem: to which may be added the offence of wilfully and maliciously shooting at any

Maliciously shooting, a species of mayhem.

driving or racing, or wilful misconduct of such coachman or other person, shall be, and the same is thereby declared to be, a misdemeanor, and punishable as such by fine or imprisonment. Proviso, not to extend to hackney coaches drawn by two horses only, and not plying for hire as stage coaches. This, it will be observed, applies only to cases where some injury short of death is inflicted. Where death ensues from the negligence or misconduct of such persons, the offence amounts either to murder or manslaughter; see *Rex v. Walker*, 1 C. & P. 320, *ante*, 183, note (10).^{*} It is perhaps to be lamented, that this is not included among those cases of misdemeanor, in which the legislature have thought it right to allow the prosecutor the expences attending the prosecution; for the liability to those expences frequently deters the injured party from bringing the offender to justice, and the offence is one of such grievous and growing prevalence, as renders it essential to the public safety, especially in and about the metropolis, that it should be suppressed through the influence of some severe examples. With respect to the allowance of expences both in cases of felony and mis-

demeanor, *vide, ante*, 19, note (15); *post* 362.

By the 7 & 8 G. IV. c. 18, § 1, reciting, that it is expedient to prohibit the setting of spring-guns and man-traps, and other engines calculated to destroy human life, or inflict grievous bodily harm, it is enacted, that if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor.

Section 2 provides, that nothing in the act contained shall extend to make it illegal to set any gin or trap, such as may have been, or may be usually set with the intent to destroy vermin.

Section 3 enacts, that if any person shall knowingly and wilfully permit any such spring-gun, man-trap, or other engine as aforesaid, which may have been set, fixed, or left in any place

^{*} Best, C. J., in his celebrated charge to the Wilts. Grand Jury, 1827, alluding to cases where death ensues from a collision of carriages, is reported to have said, "the collision of carriages may be either accidental or from the negligence of one or both of the drivers; and, in such case, it will be manslaughter. And I include within the term negligence, not only careless driving, but exciting the horses to such speed that they cannot be stopped or properly directed; the knowingly driving unbroken or vicious horses, overloading a coach, or using one that has insufficient strength or improper har-

ness. But if a man reckless of consequences, either from mere wantonness, or from an angry feeling against the proprietor of a rival coach, but intentionally, drives one carriage against another, and thereby occasions the death of a person in either carriage, that is murder, although the driver did not contemplate so fatal an issue. Disguise it under what terms you will, whether it originates in rivalry, impatience, or mere wanton indifference to the safety of life, such furious driving manifests that atrocious wickedness of disposition which lawyers call malice prepense."

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person, in any dwelling-house or other place; an offence, of which the probable consequence may be either killing or maiming him. This, though no such evil consequence *ensues, is made felony without benefit of clergy by statute 9 Geo. I. c. 22, and thereupon one Arnold was convicted in

then being in, or afterwards coming into, his or her possession or occupation, by some other person or persons, to continue so set or fixed, the person so permitting the same to continue shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid.

Section 4 provides and enacts, that nothing in the Act shall be deemed or construed to make it a misdemeanor, within the meaning of the Act, to set or cause to be set, or to be continued set, from sunset to sunrise, any spring-gun, man-trap, or other engine, which shall be set, or caused or continued to be set, in a dwelling-house, for the protection thereof. Some legislative enactment of this sort had become absolutely necessary for the protection of the public. It had of late years been the almost universal practice for landed proprietors to place spring-guns or man-traps in their parks, woods, and grounds, even where a public footpath ran through them, for the purpose, chiefly at least, of protecting their game; and the instances of injuries, always serious, and sometimes fatal, thus sustained, not only by poachers and other trespassers, but by perfectly innocent individuals, in some instances the proprietors themselves and their servants, were so numerous, that it was an imperative duty to suppress the practice by the strong arm of the law. More especially, as it had recently been decided, that no civil remedy could be obtained for such a grievance, at least by a trespasser; the court of King's Bench having held, after argument, that a trespasser, having knowledge that there were spring-guns in a wood, though he was ignorant of the particular spots where they were placed, could not maintain

an action for an injury received in consequence of his accidentally treading on a latent wire communicating with a gun, and thereby letting it off; *Ilott v. Wilkes*, 3 B. & A. 304. Even since the passing of this salutary statute, one instance has occurred, where a gentleman of respectability narrowly escaped death, by means of an engine, the use of which it was undoubtedly the object of the statute to prohibit. A landed proprietor in Hertfordshire had caused to be dug in one of his woods, through which a public footway ran, and avowedly for the purpose of detecting poachers, several pits, twelve feet in depth, little more than wide enough to contain a human body, and covered at the top by two trapdoors, so constructed as to remain closed when not pressed upon, but to open inwards when pressed by the weight of a man, and thus precipitate the passenger into the pit, without the possibility of escape. Into one of these traps the party alluded to, in crossing the wood on a Sunday, accidentally fell; and there he was detained, at a very inclement season of the year, for several hours, until discovered and released by some of his friends who had gone in search of him, and who were attracted to the spot by his cries for assistance. When means at once so barbarous and illegal are resorted to for the paltry purpose of protecting game; when the life of a human being is treated as a secondary consideration compared with the preservation of a pheasant or a partridge, it does not seem too much to say, that the system of laws out of which such evils spring, is destructive of the safety and well-being of society, and requires immediate and complete reform.

1723 for shooting at Lord Onslow; but, being half a madman, was never executed, but confined in prison, where he died about thirty years after (4).

II. The second offence, more immediately affecting the personal security of individuals, relates to the female part of his Majesty's subjects; being that of their *forcible abduction and marriage*; which is vulgarly called *stealing an heiress*. For by statute 3 Hen. VII. c. 2, it is enacted, that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors, and such as knowingly receive such woman, shall be deemed principal felons: and by statute 39 Eliz. c. 9, the benefit of clergy is taken away from all such felons, who shall be principals, procurers, or accessaries before the fact (5).

II. Forcible abduction and marriage; a capital felony;

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(4) This statute also has been wholly repealed by the 7 & 8 Geo. IV. c. 27, and the offence alluded to in the text is now punishable under the 9 Geo. IV. c. 31, §§ 11 and 12, *vide ante*, 194, note (28).

(5) These statutes are both wholly repealed by the 9 Geo. IV. c. 31, by § 19 of which it is enacted, that where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years. This section is founded

upon the repealed statute of 3 H. VII. c. 2, but differs from it very materially in its provisions. An actual marriage or defilement is not now necessary to complete the offence, as it was under the former Act. The offence, as before, will be complete, either where the woman is originally taken with her consent, and afterwards refuses to continue and is forcibly detained; or where she is originally taken against her will, and afterwards gives her consent. An indictment under this section must aver that the woman has *an* interest in some real or personal estate, or is an heiress presumptive, &c., but need not, it is conceived, describe the nature of her interest particularly. This section, it should seem, would not reach the case of the abduction of an *adopted* child. If a woman is taken against her will in one county, and goes voluntarily into another, the venue must be laid in the former, for the offence being *there complete*, the case will not be within the 7 Geo. IV. c. 64, § 12, which enacts, that where any felony or *misdemeanor* shall be committed on the boundary of two or more counties, or within 500

the abduction must be done for lucre, upon an heiress, against her will, and must be followed by marriage or defilement; a woman, thus married, may in some cases give evidence against her husband;

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In the construction of this statute it hath been determined, 1. That the indictment must allege that the taking was for lucre, for such are the words of the statute (*l*). 2. In order to shew this, it must appear that the woman has substance either real or personal, or is an heir apparent (*m*). 3. It must appear that she was taken away against her will. 4. It must also appear, that she was afterwards married, or defiled (*n*). And though possibly the marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will (*n*): and so *vice versâ*, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may, from that time, as properly *be said to be taken against her will, as if she never had given any consent at all; for, till the force was put upon her, she was in her own power (*o*). It is held that a woman, thus taken away and married, may be sworn and give evidence against the offender, though he is her husband *de facto*; contrary to the general rule of law: because he is no husband *de jure*, in case the actual marriage was also against her will (*p*). In cases indeed where the actual marriage is good, by the consent of the inveigled woman obtained after her forcible abduction, Sir Matthew Hale seems to question how far her evidence should be allowed: but other authorities (*q*) seem

(*l*) 1 Hawk. P. C. 110.

(*m*) 1 Hal. P. C. 660; 1 Hawk. P. C. 109.

(*n*) 1 Hal. P. C. 660.

(*o*) 1 Hawk. P. C. 110.

(*p*) 1 Hal. P. C. 661.

(*q*) Cro. Car. 488; 3 Keb. 193; State Trials, V., 455.

yards of such boundary, or shall be begun in one county and completed in another, it may be tried in either. This clause repeals the 59 Geo. III. c. 69, upon the same subject, but its provisions are the same as those of the former Act, with the addition of the words printed in italics. In *Wakefield's case*, (see the next note,) the abduction took place at Liverpool, and the marriage in Scotland, and he was tried in Lancashire. There, however, both the abduction and the marriage, though voluntary *de facto*, were held to be forcible *de jure*, the consent to both

having been obtained by fraud. It is remarkable that in that case the marriage was never consummated, though the parties lived together for a considerable time after it, probably from a mistaken notion on the part of the offender that defilement would render his offence capital. The punishment of death imposed by the old statutes upon this crime was first mitigated to transportation for life, or for seven years, by 1 Geo. IV. c. 115, which passed before *Wakefield's case*, and which is repealed by 9 Geo. IV. c. 31.

(6). Not so now: see the last note.

to agree, that it should even then be admitted; esteeming it absurd, that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should, by a forced construction of law, be made use of to stop the mouth of the most material witness against him (6).

An inferior degree of the same kind of offence, but not attended with force, is punished by the statute 4 and 5 Ph. and Mar. c. 8, which enacts, that if any person, above the age of fourteen, unlawfully shall convey or *take away any* stealing, de-flowering, or marrying a woman child under sixteen a misdemeanor; such marriages void.

(6) It seems to be well agreed, and indeed to be beyond all doubt, that where a woman is *taken away and married by force*, she is a competent witness against her husband, on an indictment for that offence; see Phil. Ev. 3d. ed. 70, and the authorities there cited. But the proposition that, where she consents to the marriage, after a forcible abduction, her evidence is equally admissible, seems to admit of some doubt. Mr. Phillips, *ubi supra*, says, "it should seem that if the actual marriage is valid, as where the woman after the abduction consents to the marriage voluntarily and not induced by any precedent menace, her evidence ought *not* to be allowed;" and he cites 1 Hale, P. C. 302, in support of that position, and 4 Bl. Comm. 209, *contra*. *Fulwood's case*, Cro. Car. 488, cited by the learned Commentator in support of the opinion that the wife's evidence is admissible, where the marriage is voluntary, is in fact no authority for that opinion; for it is clear from the report of that case, that the marriage there was a forced one; in the language of the wife, "by reason of threats, when she was in fear, and when she knew not what she did." The general rule of law is, that the wife shall not be examined in *any* case, to give evidence even tending to criminate her husband; *Rex v. Cliviger*, 2 T. R. 263. In a very recent case of an indictment against the wife of A. and others, for a conspiracy to procure A. to marry, it was held by Lord Tenterden, that A. was

not a competent witness in support of the prosecution; *Rex v. Serjeant*, 1 R. & M. 352; a decision which would equally apply if the prosecution were against the husband, and it was proposed to call the wife as a witness. In the last case of this kind, *Wakefield's*, both the abduction and the marriage were in fact voluntary, the lady's consent to both having been obtained by fraud; but it was held that the fraud in law amounted to *force*, and the lady was, upon that ground it is conceived, admitted as a witness against the husband. A doubt afterwards arose whether the marriage in that case was valid or not, which led to the bringing in a bill to annul it; though the prevailing opinion among the profession seemed to be, that the marriage was *ipso facto* void, as a marriage procured by force: in which view of the case, the admission of the wife's evidence would not be an authority upon the question one way or the other. One account of that trial states, that Hullock, B., declared, that even assuming the marriage to be valid, he would admit the wife's evidence, for there were cases in which the evidence of wives was admissible against their husbands, and he considered that to be one of them. And upon the principle that a woman may give evidence against her husband in the case of a personal wrong done to herself, it does seem that the wife would be a competent witness in a prosecution for abduction, even though the marriage was valid.

woman child unmarried, which is held (r) to extend to bastards as well as to legitimate children, within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the discretion of the justices: and if he deflowers such maid or woman child, or without the consent of parents contracts matrimony with her, *he* shall be imprisoned five years, or fined at the discretion of the justices, and *she* shall forfeit all her lands to her next of kin, during the life of her said husband (7). So that as these stolen marriages, under the age of sixteen, were usually upon mercenary views, this Act, besides punishing the seducer, wisely removed the temptation. But this latter part of the Act is now rendered *almost useless, by provisions of a very different kind, which make the marriage totally void (s), in the statute 26 Geo. II. c. 33 (8).

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III. Rape, punished, by the Jewish law, with death or fine;

III. A third offence, against the female part also of his Majesty's subjects, but attended with greater aggravations than that of forcible marriage, is the crime of *rape, raptus mulierum*, or the carnal knowledge of a woman forcibly and

(r) Stra. 1162.

(s) See vol. I. page 437, &c.

(7) This Act of 4 & 5 P. & M. c. 8, is wholly repealed by the 9 Geo. IV. c. 31; section 20 of which enacts, that if any person shall unlawfully take, or cause to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the court shall award. This clause was framed for the purpose of meeting such a case as that of *Wakefield*.

(8) Such a marriage, if voluntary on the part of the female, that is, not procured by force or fraud, would not now be void; it having been held, after much doubt entertained upon the point among the profession, (see *Doe v. Price*, 1 M. & R. 683,) that the 4 Geo. IV. c. 76, legalizes marriages which

would otherwise have been void under the 26 Geo. II. c. 33, on account of the minority of the parties and the non-consent of parents; see *Rex v. Birmingham*, 2 M. & R. 230; 8 B. & C. 29, and the judgment of Lord Tenterden therein. The new Act, however, provides, section 23, that if any valid marriage solemnized by licence shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under age, by means of false swearing to any matter to which such party is required personally to depose, all the property accruing from the marriage shall be forfeited, and shall be secured for the benefit of the innocent party, or *the issue of the marriage*. The latter words clearly shew the intention of the legislature *not* to render the marriage void; for the words "issue of the marriage," in an act of parliament must mean lawful issue, which they could not be if the marriage was void.

against her will. This, by the Jewish law (*t*), was punished with death, in case the damsel was betrothed to another man; and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life; without that power of divorce, which was in general permitted by the mosaic law.

The civil law (*u*) punishes the crime of ravishment with death and confiscation of goods: under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we last spoke: and also the present offence of forcibly dishonouring them; either of which, without the other, is in that law sufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced: "*sive volentibus, sive nolentibus mulieribus, tale facinus fuerit perpetratum.*" And this, in order to take away from women every opportunity of offending in this way; whom the Roman law supposes never to go astray, without the seduction and arts of the other sex: and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. "*Si enim ipsi raptores metu, vel atrocitate pœnæ, ab hujusmodi facinore se temperaverint, nulli mulieri, sive volenti, sive nolenti, peccandi locus relinquetur; quia hoc ipsum velle mulierum, ab insidiis nequissimi hominis, qui meditatur rapinam, inducitur.*" **Nisi etenim eam solicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle in tantum dedecus sese prodere* (9)." But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore makes it a necessary ingredient in the crime of rape, that it must be against the woman's will.

by the civil law with death and confiscation of goods;

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(*t*) Deut. xxii. 25.

(*u*) Cod. 9, tit. 13.

(9) For if the ravishers, either from fear or the severity of punishment, shall be deterred from the commission of such crimes, no means will be left to any woman, whether consenting or not, of sharing in those crimes; because the very inclination of women to them,

is created by the arts of the iniquitous men who meditate the commission of them. For unless a man solicit a woman, or circumvent her by odious arts, he can scarcely excite in her the inclination to betray herself to such disgrace.

by the Saxon
and ancient
British law, with
death or mutila-
tion;

Rape was punished by the Saxon laws, particularly those of King Athelstan (*w*), with death: which was also agreeable to the old Gothic or Scandinavian constitution (*x*). But this was afterwards thought too hard: and in its stead another severe, but not capital, punishment, was inflicted by William the conqueror; *viz.* castration, and loss of eyes (*y*); which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accusations, it was then the law, and, it seems, still continues to be so in appeals of rape (*z*), that the woman should immediately after, "*dum recens fuerit maleficium*," go to the next town, and there make discovery to some credible persons of the injury she has suffered: and afterwards should acquaint the high constable of the hundred, the coroners, and the sheriff with the outrage (*a*). This seems to correspond in some degree with the laws of Scotland and Arragon (*b*), which require that complaint must be made within twenty-four hours: though afterwards by statute Westm. 1, c. 13, the time of limitation in England was extended to forty days. At present there is no time of limitation fixed: for, as it is usually now punished by indictment at the suit of the king, the maxim of law takes place, that *nullum tempus occurrit regi*; but the jury will rarely give credit to a stale complaint. During the former period also it was held for law (*c*), that the woman, by consent of the judge and her parents, might redeem the offender from the execution of his sentence, by accepting him for her husband; if he also was willing to agree to the exchange, but not otherwise.

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In the 3 Edw. I. by the statute Westm. 1, c. 13, the punishment of rape was much mitigated; the offence itself, of ravishing a damsel within age, that is, *twelve* years old, either with her consent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal within forty days, and subjecting the offender only to two years' imprisonment, and a fine at the king's will. But, this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw. I., found necessary

(*w*) Bracton, l. 3, c. 28.

(*x*) Stiernh. de jure Sueon. l. 3, c. 28.

e. 2.

(*y*) LL. Guil. Conqu. c. 19.

(*z*) 1 Hal. P. C. 632.

(*a*) Glanv. l. 14, c. 6; Bract l. 3,

c. 28.

(*b*) Barrington, 142.

(*c*) Glanv. l. 14, c. 6; Bract. l. 3,

c. 28.

to make the offence of forcible rape felony by statute Westm. 2, c. 34. And by statute 18 Eliz. c. 7, it is made felony without benefit of clergy: as is also the abominable wickedness of carnally knowing and abusing any woman child under the age of ten years; in which case the consent or nonconsent is immaterial, as by reason of her tender years she is incapable of judgment and discretion. Sir Matthew Hale is indeed of opinion, that such profligate actions committed on an infant under the age of *twelve* years, the age of female discretion by the common law, either with or without consent, amount to rape and felony; as well since as before the statute of Queen Elizabeth (*d*): but that law has in general been held only to extend to infants under *ten*; though it should seem that damsels between *ten* and *twelve* are still under the protection of the statute Westm. 1, the law with respect to their seduction not having been altered by either of the subsequent statutes (10).

(*d*) 1 Hal. P. C. 631.

(10) All these statutes are repealed by 9 Geo. IV. c. 31, which enacts, section 16, that every person convicted of the crime of rape shall suffer death as a felon.

Section 17, that if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and carnally know and abuse any girl, being above the age of ten years, and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned, with or without hard labour, for such term as the court shall award.

And sect. 18, reciting, that whereas upon trials for the crimes of rape, and of carnally abusing girls under the respective ages herein before mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those crimes, enacts, that it shall not

be necessary in either of those cases, to prove the actual emission of seed in order to constitute carnal knowledge, but that the carnal knowledge shall be complete upon proof of penetration only.

The last of these enactments, which applies to both the offences immediately under consideration, is new, and important. It had been long held, that though there must be penetration to constitute the crime of rape, *Rex v. Hill*, 1 East, P. C. 439, still that proof of any, the slightest penetration was sufficient. Thus, where a penetration was proved, but not of such a depth as to injure the hymen, it was held to be sufficient to constitute the crime of rape; *Rex v. Russen*, 1 East, P. C. 438, 439. As there is nothing in the new enactment to alter the rule of evidence with respect to penetration, and as proof of emission is now wholly dispensed with, it follows that many cases which would previously have amounted only to assaults with intent to commit rape, will now amount to the actual crime of rape.

an infant cannot be convicted of rape;

A male infant, under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it. For though in other felonies *malitia supplet ætatem*, as has in some cases been shewn; yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind (*e*) (11).

a common prostitute may be the subject of rape;

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The civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind (*f*): not allowing *any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot because the woman may have forsaken that unlawful course of life (*g*): for, as Bracton well observes (*h*), "*licet meretrix fuerit antea, certe tunc temporis non fuit, cum reclamando nequitiae ejus consentire noluit*" (12).

As to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice. I shall, therefore, merely add upon this head a few remarks from Sir Matthew Hale; with regard to the competency and credibility of witnesses; which may, *salvo pudore*, be considered.

(*e*) 1 Hal. P. C. 631.

(*f*) Cod. 9, 9, 22; Ff. 47, 2, 39.

(*g*) 1 Hal. P. C. 629; 1 Hawk.

P. C. 108.

(*h*) Fol. 147.

(11) An infant cannot be convicted of an assault with intent to commit a rape; *Rex v. Eldershaw*, 3 C. & P. 396. But he may be a principal in the second degree, and punished for being present aiding and abetting, if he displays a mischievous discretion; 1 Hale, P. C. 629, 633. A husband also may be convicted as an accessory in a rape upon his wife; *Id*.

(12) "Although she may have been a prostitute before, certainly she was not so at that time, when she reclaimed herself, by refusing to consent to the crime of the ravisher." But such circumstances should certainly operate with the jury, as to the credibility of the fact, that connexion was had with the woman against her will. And see the next note.

And, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offence, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry: these, and the *like circumstances, carry a strong, but not conclusive, presumption, that her testimony is false or feigned (13).

the party ravished is a competent witness;

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(13) Upon an indictment for a rape, the woman is not compellable to answer whether she has not had connexion with other men, or with a particular person named; nor is evidence of her having had such connexion admissible; *Rex v. Hodgson*, R. & R. C. C. 211. But the prisoner may give evidence of the woman's notoriously bad character for want of chastity, or common decency, or that she had before been connected with himself; *Id. ibid. Rex v. Clarke*, 2 Stark. 243. And if the prosecutrix, in an indictment for an assault with intent to commit a rape, is cross-examined to shew that she committed crimes several years before, witnesses may be called to shew that her character has since been good; *Id.* 241. What the woman herself has said so recently after the fact as to preclude the possibility of her being practised on, has been held to be admissible in evidence as a part of the transaction; but the particulars of her complaint are not evidence of the truth of her statement; *Id. ibid. Rex v. Brazier*, 1 East, P. C. 444. If something occurs to create an alarm in the mind of the party while he is perpetrating the offence, it is for the jury to say whether he left the body *re infectâ* because of the alarm, or whe-

ther he left it because his purpose was accomplished; *Rex v. Burrows*, R. & R. C. C. 519. It has been held, by a majority of the judges, that having carnal knowledge of a married woman, under circumstances which induce her to suppose it is her husband, does not amount to the crime of rape; *Rex v. Jackson*, *id.* 487. That decision took place in Trinity term, 1822; and though it may not hitherto have been expressly overruled, it seems very doubtful whether it would now be supported. At the Kent winter gaol delivery, in the very same year, a similar case occurred; *Rex v. Pearson*, in which upon the prosecutrix swearing that she believed the prisoner to be her husband, and consequently made no resistance, the editor, as counsel for the prisoner, objected that the offence was not rape, and that the indictment could not be supported. But Bayley, J., refused to stop the prosecution, intimating his own strong opinion that such facts did amount to rape, and declaring his intention to reserve the point for the opinion of the twelve judges, if it should be necessary; which, however, was not the case, the prisoner being acquitted on the merits. It afterwards appeared that the learned judge had

an infant under twelve sometimes a competent witness; hearsay evidence of her declarations not admissible where she is not herself competent;

Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath: or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she hath not, it is thought by Sir Matthew Hale (i) that she ought to be heard without oath, to give the court information; and others have held, that what the child told her mother, or other relations, may be given in evidence, since the nature of the case admits frequently of no better proof. But it is now settled, (Brazier's case, before the twelve judges, P. 19 Geo. III.) that no hearsay evidence can be given of the declarations of a child who hath not capacity to be sworn, nor can such child be examined in court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected (14). Yet,

(i) 1 Hal. P. C. 634.

directed, in the event of the grand jury ignoring the bill for the capital offence, that an indictment for a misdemeanor should be presented in the following form: "that A. B., of, &c. on, &c. about the hour of eleven in the night of the same day, with force and arms at, &c., the dwelling-house of C. D., there situate, wrongfully and unlawfully did break and enter, and E. F. then and now the wife of the said C. D., in the same dwelling house then being, in bed and undressed, fraudulently and wrongfully, under colour and pretence of being the said C. D., did assault and carnally know, she, the said E. F., being then and there wholly ignorant that the said A. B. was not the said C. D., and she, the said E. F. then and there supposing and believing that the said A. B. then and there was the said C. D.; to the grievous damage of the said C. D. and E. F., and against the peace," &c. ED. MS. The only plausible ground for contending that such an offence does not amount to rape, seems to be, the total absence of force on the part of the man, and of resist-

ance on the part of the woman; but that does not appear to be a solid or well-founded argument; because the fraud practised would, by construction of law, be considered as force, as in Wakefield's case of abduction, ante, 209, notes (6) and (7), and in other cases that might be mentioned, and would thus support the necessary allegation of force in the indictment. In the offences provided against by the 17th section of the new act, ante, 212, note (10), it is immaterial whether the act is done with or without the consent of the female.

(14) Children of any age may be examined, upon oath, if apprized of the nature of an oath, and capable of distinguishing between good and evil; Brazier's case, 1 Leach, 199; 1 East, P. C. 443; and see *Rex v. Dannel*, id. 442; Bull. N. P. 293; 1 Leach, 237. "But children cannot be examined in any case, without oath. This is now the established rule in all cases, criminal as well as civil, and whether the prisoner is tried for a capital offence, or for one of an inferior nature. When

where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be, therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

“It is true,” says this learned judge (*j*), “that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent.” He then relates two very extraordinary cases of malicious prosecution for this crime, that had happened within his own observation; and concludes thus: “I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses.”

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IV. What has been here observed, especially with regard

(*j*) 1 Hal. P. C. 635.

the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary, for the purposes of justice, to put off the trial of the prisoner, directing that the child in the mean time should be properly instructed;” 1 Phil. Ev. 19. In an indictment for a rape, the deposition of the girl taken before the committing magistrate, and signed by him, may, after her death, be read in evidence at the

trial of the prisoner, although it was not signed by her, and she was under twelve years of age; provided she was sworn, and appeared competent to take an oath; and all the facts necessary to complete the crime may be collected from the testimony so given in evidence; *Rex v. Flemming*, 2 Leach, 854; 1 East, P. C. 440. See further as to the admissibility in evidence of the depositions and dying declarations of parties deceased, post 359.

IV. The same rules of evidence apply to *unnatural crimes*;

to the manner of proof, which ought to be the more clear in proportion as the crime is more detestable, may be applied to another offence, of a still deeper malignity; the infamous *crime against nature*, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself (15).

I will not act so disagreeable a part, to my readers, as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter Christianos non nominandum*" (k) (16). A taciturnity ob-

(k) See in Rot. Parl. 50 Edw. III. n. 58, a complaint, that a Lombard did

commit the sin "that was not to be named." (12 Rep. 37.)

(15) By stat. 9 Geo. IV. c. 31, § 15, every person guilty of this offence, either with mankind or with any *animal*, shall suffer death as a felon. And by § 18, it is directed, that the proof of penetration only shall be sufficient for the purpose of conviction. Where the prisoner forced open a child's mouth, and put in his private parts, and proceeded to a completion of his lust, it was held that this did not constitute the crime of sodomy; *Rex v. Jacobs*, R. & R. C. C. 331. An unnatural connexion with an animal of the fowl kind has been held not to be sodomy; *Rex v. Mulreaty*, 1 Russell, 568; but, as the ground of that decision was that a fowl did not come under the term *beast*, which is omitted in the new Act, and the general term *animal* substituted, the case does not now appear applicable. The mere soliciting another to the commission of this crime, is an indictable offence; 2 Russell, 568. It need not be proved that the offence was committed against the consent of the

person upon whom it is perpetrated; though, if committed with his consent, both are equally liable to punishment. Where the defendant was indicted for having committed this offence with a woman, a majority of the judges held that this was within the statute; but two or three of them held that it was not: no opinion was publicly given; *Rex v. Wiseman*, Fortesque, 91. If it be committed on a boy under fourteen years of age, it is felony in the agent only; 1 Hale, P. C. 670; 3 Inst. 59: and the same it should seem, as to a girl under twelve. Accusing, or threatening to accuse, either verbally or by letter, any person of this, among other crimes, with intent to extort money, is an offence punishable, by 7 & 8 G. IV. c. 29, § 8, with transportation for life, or seven years, or imprisonment not exceeding four years, with, in the case of male offenders, whippings; Vide *ante*, 137, note (34).

(16) That horrible sin, not to be named among Christians.

served *likewise by the edict of Constantius and Constans (l); “*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis pœnis subdantur infames, qui sunt, vel qui futuri sunt rei*” (17). Which leads me to add a word concerning its punishment.

This the voice of nature and of reason, and the express law of God (m), determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from Heaven: so that this is an universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death (n); though Fleta (o) says they should be buried alive: either of which punishments was indifferently used for this crime among the ancient Goths (p). But now the general punishment of all felonies is the same, namely, by hanging: and this offence (being in the times of popery only subject to ecclesiastical censure) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6, revived and confirmed by 5 Eliz. c. 17. And the rule of law herein is, that, if both are arrived at years of discretion, *agentes et consentientes pari pœnâ plectantur* (q) (18).

these crimes are capitally punished by a concurrence of all known authorities.

These are all the felonious offences more immediately against the personal security of the subject. The inferior offences, or misdemeanors, that fall under this head, are *assaults batteries, wounding, false imprisonment, and kidnapping*.

Misdemeanors affecting individuals, are,

V. VI. VII. With regard to the nature of the three first of these offences in general, I have nothing further to add to what has already been observed in the preceding book of these Commentaries (r); when we considered them as private wrongs, or civil injuries, for which a satisfaction or re-

V. VI. VII. Assaults, batteries, and wounding;

(l) Cod. 9, 9, 31.

(m) Levit. xx. 13, 15.

(n) Brit. c. 9.

(o) l. 1, c. 37.

(p) Stiernh. de jure Goth. l. 3, c. 2.

(q) 3 Inst. 59.

(r) See vol. III. page 120.

(17) Where that crime exists, which it is dangerous to explain, we call upon the laws to rise up, armed with the sword of vengeance, that those infamous persons, who are, or may in future be

guilty of it, may be restrained by exemplary punishments.

(18) Both the agent and the patient shall suffer the same punishment.

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medy is given to the party aggrieved. But, taken in a public light, as a *breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties, where they are committed with any very atrocious design (s) (19). As in case of

(s) 1 Hawk. P. C. 65.

(19) By 9 Geo. IV. c. 31, § 24, if any person shall assault and strike, or wound, any magistrate, officer, or other person whatsoever lawfully authorized, on account of the exercise of his duty, in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects, wrecked, stranded, or cast on shore, or lying under water, every such offender shall be liable to transportation for seven years, or to be imprisoned with or without hard labour, for such term as the court shall award.

By § 25, where any person shall be charged with and convicted of any of the following offences as misdemeanors; that is to say, of "any assault with intent to commit felony; of any assault upon any peace-officer, or revenue-officer, in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages: in any such case the court may sentence the offender to be imprisoned, with or without hard labour, for any term not exceeding two years; and may, also, (if it shall so think fit,) fine the offender, and require him to find sureties for keeping the peace."

By § 26, if any person shall unlawfully and with force hinder any seaman, keelman, or caster, from working at or exercising his lawful trade, business, or

occupation, or shall beat, wound, or use any other violence to him, with intent to deter or hinder him from working at or exercising the same; or if any person shall beat, wound, or use any other violence to any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal, or malt, in any market or other place, or shall beat, wound, or use any other violence to any person having the care or charge of any wheat or other grain, &c. whilst on its way to or from any city, market-town, or other place, with intent to stop the conveyance of the same; every such offender may be convicted thereof before two justices, and imprisoned and kept to hard labour for any term not exceeding three months: provided that no person who shall be punished for any such offence by virtue of this provision, shall be punished for the same offence by virtue of any other law.

By § 27, "whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided under the limitations herein after mentioned; where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence; and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs, (if ordered,) the sum of five pounds, which fine shall be paid to some one of the overseers of the poor, or to some other

an assault with an intent to murder, or with an intent to commit either of the crimes last spoken of (20); for which intentional assaults, in the two last cases, indictments are much more usual, than for the absolute perpetration of the facts themselves, on account of the difficulty of proof: or, when both parties are consenting to an unnatural attempt, it is usual not to charge any *assault*; but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer, the commission of the abominable crime before mentioned. And in all these cases, besides heavy fine and imprisonment, it is usual to award judgment of the pillory (21).

officer of the parish, township, or place, in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division, in which such parish, township, or place, shall be situate, whether the same shall or shall not contribute to such general rate; and the evidence of any inhabitant of the county, riding, or division, shall be admitted in proof of the offence, notwithstanding such application of the fine incurred thereby; and if such fine as shall be awarded by the said justices, together with the costs, (if ordered,) shall not be paid, either immediately after the conviction, or within such period as the said justices shall, at the time of the conviction, appoint, it shall be lawful for them to commit the offender for any term, not exceeding two months, unless such fine and costs be sooner paid; but if the justices, upon the hearing of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."

By § 28, such certificate, or payment

of fine, or suffering of imprisonment, under such conviction, shall relieve the offender from all other proceedings, civil or criminal, for the same cause.

And § 29 provides, that where the justices shall find the assault to have been accompanied by an attempt to commit felony, or shall be of opinion that it is a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon; and that they shall not be authorized to hear and determine any case of assault, &c. where the title to lands, tenements &c. comes in question, or any interest accruing therefrom, or as to any bankruptcy, insolvency, or any execution under the process of any court of justice.

(20) If a master takes indecent liberties with a female scholar, without her consent, though she does not resist, he may be punished for a common assault; *Rex v. Nichol*, R. & R. C. C. 180.

Making a female patient strip naked, under the pretence that the defendant, a medical man, cannot otherwise judge of her illness, if he himself takes off her clothes, is an assault; *Rex v. Rosinski*, R. & M. C. C. 19.

(21) It would be an almost endless task to cite cases upon the subject of assaults and batteries, but some general rules and principles it may be useful shortly to advert to. An assault is an attempt to commit a forcible crime

battery of a clergyman punishable by three distinct kinds of prosecution.

There is also one species of battery, more atrocious and penal than the rest, which is the beating of a clerk in orders, or clergyman; on account of the respect and reverence due to his sacred character, as the minister and ambassador of peace. Accordingly it is enacted by the statute called *articuli cleri*, 9 Edw. II. c. 3 (22), that if any person lay

against the person of another, as a battery, murder, robbery, rape, &c. The same indictment may charge an attempt to commit a battery, and a battery actually committed; and upon proof of either, the defendant must be convicted. Striking at another with a stick or the fist, though the party striking misses his aim; 2 Rol. Abr. 1. 45: drawing a sword or bayonet, or throwing a bottle or glass, with intent to wound or strike; presenting a gun at a man who is within the distance to which the gun will carry; pointing a pitchfork at him, when within reach of it; or any other act indicating an intention to use violence against the person of another, is an assault; 1 Hawk. P. C. c. 2, § 1. But mere words can never amount to an assault; Id. And if a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault; Com. Dig. *Battery*, C.

A battery, in its legal sense, includes beating and wounding; and beating, in construction of law, means not merely to strike forcibly with the hand, a stick, &c., but includes every touching (however trifling) of another's person, in an angry, revengeful, rude, or insolent manner; 1 Hawk, P. C. c. 62, § 2: as, thrusting or pushing a man, in anger; 6 Mod. 149: holding him by the arm; spitting in his face; id. 172: jostling him out of the way; id. 149: pushing another against him; Bul. N. P. 16: throwing a squib at him; 2 W. Bl. 892: striking a horse on which he is riding, whereby he is thrown; 1 Mod. 24; W. Jon. 440; or the like. If a man strike at another with a cane, or a fist, or throw a bottle at him, or the like, and hit him, it is a battery. A wound-

ing is where the violence is so great as to draw blood, by striking or stabbing with a sword, knife, or other instrument; or by shooting, or by striking with a cudgel, the fist, or the like.

It is a good defence to such an indictment, to prove that the alleged battery happened by misadventure; 2 Salk. 637; Moor, 864; Hob. 134; 1 Stra. 490: that it was merely an amicable contest; Com. Dig. *Pleader*, 3 M. 18: that it was merely the moderate and proper correction of a child by his parent, or a servant or scholar by his master, or the legal punishment of a criminal by the proper officer: Id. 3 M. 19; 1 Hawk. P. C. c. 60, § 23; c. 62, § 2; 2 B. & B. 224; Bul. N. P. 19: that the defendant committed it in his own defence; 1 Sid. 246; 2 Rol. Rep. 19; 2 Salk. 642; 3 Salk. 46: or in defence of his wife, child, or servant, and *vice versa*; 2 Rol. Abr. 546, D.; 1 Hawk. P. C. c. 60, ss. 23, 24: or in defence of his possession; Lutw. 1435; Hardw. 358; 2 Rol. Abr. 548, l. 25; id. 549, l. 7, 10; 2 Bro. Ent. 260, &c. But, in all these cases, the battery must be only such as was necessary and unavoidable; Archb. C. P., *Assault*; which see for a fuller statement of the law and decisions upon the subject.

(22) This Act is repealed, so far as relates to laying violent hands on a clerk, by 9 Geo. IV. c. 31: by § 23 of which, if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor; and, being

violent hands upon a clerk, the amends for the peace broken shall be before the king; that is by indictment in the king's courts: and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed: which if the offender will redeem by money, to be given to the bishop, or the party grieved, it may be sued for before the bishop; whereas, otherwise to sue in any spiritual court, for civil damages for the battery, falls within the danger of *præmunire* (*t*). But suits are, and always were, allowable in the spiritual court, for money agreed to be given as a commutation for penance (*u*). So that, upon the whole, it appears, that a person guilty of such brutal behaviour to a clergyman, is subject to three kinds of prosecution, all of which may be pursued for one and the same offence: an indictment, for the breach of the king's peace by such assault and battery; a civil action, for the special damage sustained by the party injured; and a suit in the ecclesiastical court, first, *pro correctione et salute animæ*, by *enjoining* penance, and then again for such sum of money as shall be agreed on for *taking off* the penance enjoined: *it being usual in those courts to exchange their spiritual censures for a round compensation in money (*v*); perhaps because poverty is generally esteemed by the moralists the best medicine *pro salute animæ*.

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VIII. The two remaining crimes and offences, against the persons of his Majesty's subjects, are infringements of their natural liberty: concerning the first of which, *false imprisonment*, its nature, and incidents, I must content myself with referring the student to what was observed in the preceding volume (*w*), when we considered it as a mere civil injury. But, besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of its members, and for the infringe-

VIII. False imprisonment.

(*t*) 2 Inst. 492, 620.(*v*) 2 Roll, Rep. 384.(*u*) Artic. Cler. 9 Edw. II. c. 4,
F. N. B. 53.(*w*) See vol. III. page 127,

convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award. The 50 Edw. III. c. 5, and 1 Rich. II. c.

15, upon the same subject, are also repealed by the new Act. The arrest, if not on a Sunday, would be good in law; Wats. c. 34.

ment of the good order of society (23). We have seen before (*x*), that the most atrocious degree of this offence, that of sending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is punished with the pains of *præmunire*, and incapacity to hold any office, without any possibility of pardon (*y*). And we may also add that, by statute 43 Eliz. c. 13 (24), to carry any one by force out of the four northern counties, or imprison him within the same, in order to ransom him or make spoil of his person or goods, is felony without benefit of clergy in the principals and all accessaries before the fact. Inferior degrees of the same offence, of false imprisonment, are also punishable by indictment (like assaults and batteries), and the delinquent may be fined and imprisoned (*z*). And, indeed (*a*), there can be no doubt, but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemeanors whatsoever, of a notoriously evil example, may be indicted at the suit of the king.

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IX. Kidnapping,
a felony by the
Irish law; by

IX. The other remaining offence, that of *kidnapping* (25), being the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them

(*x*) See page 116.

(*y*) Stat. 31 Car. II. c. 2.

(*z*) West. Symbol. part 2, page 92.

(*a*) 1 Hawk. P. C. 210.

(23) In an indictment for false imprisonment, all that the prosecutor has to prove is the imprisonment; it is for the defendant to shew that he was justified in what he did, and that the imprisonment was lawful. Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets; 2 Inst. 589; Cro. Car. 210; Com. Dig. *Imprisonment*, G. Where a magistrate's warrant was shewn by a constable to the person named in it, who, without compulsion, attended the constable to the magistrate, and upon examination was dismissed; this, it seems, was not an imprisonment; (But see *Bridgett v. Coyney*, 1 M. & R. 211.) A count

for assault and battery may be joined to a count for imprisonment, and if the prosecutor fails to prove the imprisonment, he may still prove the assault and battery.

An imprisonment may be justified on the ground of, an arrest under civil process; an arrest under warrant; an arrest without warrant; an arrest for contempt; an arrest after an escape; and an arrest under certain other authorities; Archb. C. P., *False Imprisonment*; which see for a full statement of the law and decisions upon the subject.

(24) Repealed by 7 & 8 Geo. IV. c. 27.

(25) See 31 Car. II. c. 2, which prohibits the sending any British subject to any foreign prison.

into another, was capital by the Jewish law. "He that stealeth a man, or selleth him, or if he be found in his hand, he shall surely be put to death (b)." So likewise in the civil law, the offence of spiriting away and stealing men and children; which was called *plagium*, and the offender *plagiarii*, was punished with death (c). This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory (d) (26). And also the statute 11 and 12 W. III. c. 7, though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad as are thus kidnapped or spirited away, by enacting, that if any captain of a merchant vessel shall, during his being abroad, force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months' imprisonment (27). And thus much for offences that more immediately affect the *persons* of individuals.

(b) Exod. xxi. 16.

(c) Ff. 48, 15, 1.

(d) Raym. 474; 2 Show. 221; Skin.

47; Comb. 10.

(26) Stealing children was, by 54 Geo. III. c. 101, punishable as in cases of grand larceny: but that statute is now repealed by 9 Geo. IV. c. 31; by § 31 of which, "if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain, any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as herein before mentioned: every such offender, and every person counselling, aiding or abetting, such offender, shall be guilty of felony; and being con-

victed thereof, shall be liable to be transported for the term of seven years, or to be imprisoned, with or without hard labour, for any term not exceeding two years, and if a male, to be once, twice, or thrice, publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment. Provided always that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof."

(27) By 9 Geo. IV. c. 31, § 30, if any master of a merchant vessel shall, during his being abroad, force any man on shore, or wilfully leave him behind in any of his Majesty's colonies or elsewhere, or shall refuse to bring home

with him again all such of the men whom he carried out with him, as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof, shall be imprisoned for such term as the court shall award; and all such offences may be prosecuted by indictment or by information, at the suit of his Majesty's attorney general, in the court of King's Bench, and may be alleged in the in-

dictment or information to have been committed at Westminster, in the county of Middlesex: and the said court is hereby authorized to issue one or more commissions, if necessary, for the examination of witnesses abroad; and the depositions taken under the same, shall be received in evidence on the trial of every such indictment or information. So much of the 11 & 12 W. III. c. 7, and of the 58 G. III. c. 38, as related to this subject, is repealed by the 9 G. IV. c. 31.

CHAPTER XVI.

OF OFFENCES AGAINST THE HABITATIONS
OF INDIVIDUALS.

THE only two offences, that more immediately affect the *habitations* of individuals or private subjects, are those of *arson* and *burglary*.

Offences against the habitations of individuals are,

I. Arson, *ab ardendo*, is the malicious and wilful burning of the house or outhouse of another man. This is an offence of very great malignity, and much more pernicious to the public than simple theft: because, first, it is an offence against that right of habitation, which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains in *esse* for the benefit of the public; whereas, by burning, the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which too it is often the cause: since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas, fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law (*a*) punishes with death such as maliciously set fire to houses in towns, and contiguous to others; but is more merciful to such as only fire a cottage, or house, standing by itself.

I. Arson, a malignant offence, often including murder;

Our English law also distinguishes with much accuracy upon this crime. And therefore we will inquire, first, what is such a house as may be the subject of this offence: next, wherein the offence itself consists, or what amounts to a burning of such house; and lastly, how the offence is punished.

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susceptible of nice distinctions;

1. Not only the bare dwelling-house, but all outhouses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject

may be a felony, or a misdemeanor;

(a) Ff. 48, 19, 28, § 12.

of arson (*b*). And this by the common law: which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house (*c*). The burning of a stack of corn was anciently likewise accounted arson (*d*) (1). And indeed all the niceties and distinctions which we meet with in our books, concerning what shall, or shall not, amount to arson, seem now to be taken away by a variety of statutes; which will be mentioned in the next chapter, and have made the punishment of wilful burning equally extensive as the mischief. The offence of arson, strictly so called, may be committed by wilfully setting fire to one's own house, provided one's neighbour's house is thereby also burnt; but, if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's (*e*). For by the common law no intention to commit a felony amounts to the same crime; though it does, in some cases, by particular statutes. However such wilful firing one's own house, *in a town*, is a high misdemeanour, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour (*f*). And if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant (*g*) (2)

(*b*) 1 Hal. P. C, 567.

(*c*) 3 Inst, 69.

(*d*) 1 Hawk. P. C. 105.

(*e*) Cro. Car. 377; 1 Jon. 351.

(*f*) 1 Hal. P. C. 568; 1 Hawk.

P. C. 106.

(*g*) Fost. 115.

(1) This is declared to be arson by 7 & 8 Geo. IV. c. 30, § 17, and is made a capital offence; and the setting fire to any crops of corn, grain, or pulse, whether standing or cut down, or to any woods or heaths, is made felony, punishable with transportation for seven years, or imprisonment not exceeding two years, with whipping to male offenders in addition. See this section fully set forth, post, 245, *in notis*.

(2) But these distinctions are now annihilated by 7 & 8 Geo. IV. c. 30, § 2, which enacts, that if any person

shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded; or shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, *whether the same, or any of them respectively, shall then be in the possession of the offender, or in*

2. As to what shall be said to be a *burning*, so as to amount to arson, a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely *burns*, does not fall within the description of *incendit et combussit* (3); which were words necessary, in the days of law-latin, to all indictments of this sort. But the burning and consuming of any part is sufficient; though the fire be afterwards extinguished (*h*). Also it must be a *malicious* burning; otherwise it is only a trespass; and therefore no negligence or mischance amounts to it. For which reason, though an unqualified person, by shooting with a gun, happens to set fire to the thatch of a house, this Sir Matthew Hale determines not to be felony, contrary to the opinion of former writers (*i*).

if malicious, a felony; if negligent, a misdemeanor:

(*h*) 1 Hawk. P. C. 106.

(*i*) 1 Hal. P. C. 569.

the possession of any other person, with intent thereby to injure or defraud any person, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon. The provision with respect to churches and chapels appears to be new. The present Act differs also from the repealed Act of 52 Geo. III. c. 130, in using the words "set fire to" alone, instead of the words "burn or set fire to;" but, from analogy to *Taylor's case*, 2 East, P. C. c. 21, § 4, it would seem to be still necessary to prove an actual burning, to bring a party within the statute. A school-room separated from the dwelling-house by a passage about a yard wide, the roof of which was partly overhung by that of the dwelling-house, the two buildings, with others, and the court which enclosed them, being rented by the same person, was held to be an "outhouse," within the 9 Geo. I. c. 22; *Winter's case*, R. & R. C. C. 295. A prison, or common gaol, has been held to be a "house," within the same statute; *Rex v. Donovan*, 2 W. Bla. 682. If an indictment for arson describes the premises as in the possession of A., proof that they were in the possession of the tenants of A. will support it; *Rex v. Ball*, R.

& M. C. C. 30. Where a pauper set fire to a house in which he was put to live by the overseers, and the trustees, in whom the legal ownership was vested, were not known, it was held that it might be described as the house of the overseers, or of persons unknown; *Rex v. Rickman*, 2 East, P. C. 1034. An indictment for arson, whether at common law or under the statute, must describe the parish in which the offence is stated to have been committed, according to the fact.

(3) But the fact of burning is, in the absence of other circumstances, strong presumptive evidence of a felonious intent, for a man must necessarily be deemed to have intended the mischief which is the consequence of this act; *Rex v. Farrington*, R. & R. C. C. 207. So, if a man, maliciously intending to burn the house of A., accidentally burns the house of B., he may be indicted for maliciously burning the house of B.; 1 Hawk. P. C. c. 18, § 18. An indictment for arson with intent to defraud an insurance company cannot be sustained, if the policy produced is inadmissible for want of a stamp; *Rex v. Gilson*, R. & R. C. C. 138; See *Stark*, C. P. 439.

But by statute 6 Ann. c. 31, any servant, negligently setting fire to a house or outhouses, shall forfeit 100*l.* or be sent to the house of correction for eighteen months; in the same manner as the Roman law directed, "*eos, qui negligenter ignes apud se habuerint, fustibus vel flagillis cædi*" (*k*) (4).

punishable with death from the earliest ages :

3. The *punishment* of arson was death by our ancient Saxon laws (*l*). And, in the reign of Edward the first, this sentence was executed by a kind of *lex talionis*; for the incendiaries were burnt to death (*m*); as they were also by the Gothic constitutions (*n*). The statute 8 Hen. VI. c. 6, made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason. But it was again reduced to felony by the general acts of Edward VI. and queen Mary: and now the punishment of all capital felonies is uniform, namely, by hanging. The offence of arson was denied the benefit of clergy by statute 21 Hen. VIII. c. 1, but that statute was repealed by 1 Edw. VI. c. 12, and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute of 4 and 5 P. and M. c. 4, *which expressly denied it to the accessory before the fact (*o*); though now it is expressly denied to the principal in all cases within the statute 9 Geo. I. c. 22.

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II. Burglary.

II. Burglary, or nocturnal housebreaking, *burgi latrocinium*, which by our ancient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence; not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature; an invasion, which in such a state would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws also come in to the assistance of the weaker party: and, besides that they leave him this na-

(*k*) Ff. 1, 15, 4.

(*l*) LL. Inæ. c. 7.

(*m*) Britt. c. 9.

(*n*) Stiernh. de jure Goth. l. 3, c. 6.

(*o*) 11 Rep. 35; 2 Hal. P. C. 346, 347; Foster, 336.

(4) "Those who negligently keep fires about them, shall be beaten with clubs or whips." The punishment

inflicted by 6 Ann. c. 31, was again inflicted by 14 Geo. III. c. 78, § 84; which appears to be unrepealed.

tural right of killing the aggressor, if he can, as was shewn in a former chapter (*p*), they also protect and avenge him, in case the might of the assailant is too powerful (5). And the

(*p*) See page 180.

(5) As the statute law relating to burglary and housebreaking has recently undergone considerable alterations, it is deemed advisable to set out all the enactments in the first instance; their bearings upon the text will be explained in the progress of the chapter.

The 7 & 8 Geo. IV. c. 29, § 10, enacts, That if any person shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon. And see *post* 240, note (42).

Sect. 11 enacts, That every person convicted of burglary shall suffer death as a felon; and declares, that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house, in the night time, such person shall be deemed guilty of burglary.

Sect. 12 enacts, That if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security to any value whatever; or shall steal any such property to any value whatever in any dwelling-house, any person therein being put in fear; or shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5*l.* or more; every such offender, being convicted thereof, shall suffer death as a felon.

It must be observed with reference to this sect., (12) That by 2 & 3 W. IV. c. 62, reciting, that by 7 & 8 Geo. IV. c. 29, and by 9 Geo. IV. c. 55, it is enacted, That if any person shall steal in any dwelling-house any chattel,

money, or valuable security, to the value in the whole of five pounds or more, every such offender, being convicted thereof, shall suffer death as a felon; it is enacted, that so much of each of the said acts as inflicts the punishment of death upon persons convicted of the felony before specified shall be repealed, and that in future every person convicted of such felony, or of counselling, aiding, or abetting the commission thereof, shall be transported beyond the seas for life. And also, that by 3 & 4 W. IV. c. 44, reciting, that by 7 & 8 Geo. IV. c. 29, it is enacted, that if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security to any value whatever, every such offender, being convicted thereof, shall suffer death as a felon, and that principals in the second degree, and accessaries before the fact are punishable in the same manner; it is enacted, that so much of the said act as inflicts the punishment of death upon persons convicted of the felony before specified, shall be repealed. It will be seen, therefore, that the first and third offences mentioned in sect. 12, of the 7 & 8 Geo. IV. c. 29, have now ceased to be capital, while the intermediate offence of stealing in a dwelling-house, some person therein being put in fear, still continues capital.

Sect. 13, of 7 & 8 Geo. IV. c. 29, provides and enacts, that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for the purposes of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either

law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome, as expressed in the words of Tully (*q*); "*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium* (6)?" For this reason no outward doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eavesdroppers, nuisancers, and incendiaries: and to this principle it must be assigned, that a man may assemble people together lawfully, at least if they do not exceed eleven, without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case (*r*).

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The definition of a burglar, as given us by Sir Edward Coke (*s*), is, "he that by night breaketh and entereth into a mansion-house, with intent to commit a felony." In this definition there are four things to be considered; the *time*, the *place*, the *manner*, and the *intent*.

must be in the
night;

1. The *time* must be by night, and not by day; for in the day time there is no burglary. We have seen (*t*), in the case

(*q*) Pro domo, 41.

(*s*) 3 Inst. 63.

(*r*) 1 Hal. P. C. 547.

(*t*) See page 180, 181.

immediate, or by means of a covered and enclosed passage leading from the one to the other.

Sect. 14 enacts, that if any person shall break and enter any building and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision herein before mentioned, every such offender, being convicted thereof, either upon an indictment for the same offence, or upon an indictment for burglary, housebreaking, or stealing to the value of 5*l.* in a dwelling-house, containing a separate count for such offence, shall be liable, at the discretion of the court, to be trans-

ported for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

And sect. 15 enacts, that if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award, as herein-before last mentioned.

(6) For what is there more sacred, or more protected by every religious feeling, than a man's private dwelling?

of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be, that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary (*u*). But this does not extend to moonlight; for then many midnight burglaries would go unpunished: and, besides, the malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless (*7*).

As to the *place*. It must be, according to Sir Edward Coke's definition, in a *mansion-house*; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei* (*v*). But it does not seem absolutely necessary, that it should in all cases be a mansion-house; for it may also be committed by breaking the gates or walls of a *town* in the night (*w*); though that perhaps Sir Edward Coke would have called the mansion-house of the garrison or corporation. Spelman defines burglary to be, "*nocturna diruptio alicujus *habitaculi, vel ecclesiæ, etiam murorum portarumve burgi, ad feloniam perpetranda* (*8*)."

And therefore we may safely conclude, that the requisite of its being *domus mansionalis* is only in the burglary of a private house: which is the most

must be in a dwelling-house, or some building parcel of a dwelling-house;

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(*u*) 3 Inst. 63; 1 Hal. P. C. 350; 1 Hawk. P. C. 101.

(*v*) 3 Inst. 64.

(*w*) Spelm. Gloss. t. Burglary; 1 Hawk. P. C. 103.

(7) These observations are still applicable. The first branch of § 11 of the new statute, merely provides the punishment of death for burglary at common law, which was, and still is, the breaking and entering a house in the night time, with intent to steal; the second is in effect a consolidation of the provisions in the 18 Eliz. c. 7, and the 12 Ann. st. 1, c. 7, § 3, on

the same subject; and therefore, in an indictment for burglary, the breaking, the entry, the ownership of the house, the severance of occupation, and the time of night, remain still liable to the same questions as before.

(8) The breaking in the night time of a man's dwelling, or of a church, or even of the wall, or gate of a town, with intent to commit felony.

frequent, and in which it is indispensably necessary to form its guilt, that it must be in a mansion or dwelling-house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi*, is the object of burglary; though no one be in it, at the time of the fact committed (*x*). And if the barn, stable, or warehouse, be parcel of the mansion-house and within the same common fence (*y*), though not under the same roof or contiguous, a burglary may be committed therein: for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or home-stall (*z*). A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner (*a*). So also is a room or lodging, in any private house, the mansion for the time being of the lodger; if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But, if the owner himself lies in the house, and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner (*b*). Thus too the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers (*c*). But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwelling-house, nor can burglary be committed therein: for by the *lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein, when I never lie there (*d*). Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein (*e*);

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(*x*) 1 Hal. P. C. 556; Fost. 77.

(*y*) *K. v. Garland*, P. 16 Geo. III.
by all the judges.

(*z*) 1 Hal. P. C. 558; 1 Hawk.
P. C. 104.

(*a*) 1 Hal. P. C. 556.

(*b*) Kel. 84; 1 Hal. P. C. 556.

(*c*) Foster, 38, 39.

(*d*) 1 Hal. P. C. 558.

(*e*) 1 Hawk. P. C. 104

for the law regards thus highly nothing but permanent edifices; a house, or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the same circumstances (9).

(9) The new statute does not contain the word *mansion*, which was formerly held to comprehend out-houses, if parcel of the dwelling-house; the consequence of which, and of the new provisions in §§ 13 & 14, is, that no building, except a dwelling-house, or a building immediately connected therewith, can now be the subject of burglary, either at common law, or under the new statute. Where the owner has never by himself, or by any of his family, slept in the house, it is not his dwelling-house, so as to be the subject of burglary; *Rex v. Martin*, R. & R. C. C. 108. And see *Lyon's case*, Leach, 169; *Thompson's case*, id. 893. Where a servant has part of a house for his own occupation, and the rest is reserved by the proprietor for other purposes, the part reserved cannot be deemed part of the servant's dwelling-house; and it will be the same if any other person has part of the house, and the rest is reserved; *Rex v. Wilson*, R. & R. C. C. 115. Where a servant stipulates upon hire for the use of certain rooms in his master's premises for himself and family, the premises may be described as the master's dwelling-house, although the servant is the only person who inhabits them; for he shall be considered as living there as servant, not as holding as tenant; *Rex v. Stock*, id. 185. Where a shop was rented with some of the apartments of a house, it was held that the shop was still part of the dwelling-house, and that burglary might be committed in it, as the house of the landlord. *Gibson's case*, Leach, 287. Where it must be laid in the indictment to be the dwelling-house of

the landlord, if he break open the apartments of his lodgers, and steal their goods, it is not burglary, for a man cannot be guilty of burglary in his own house; Kel. 84. A father let a shop, passage, and cellar, part of his house, to his son. The son did not sleep there, and there was a distinct entrance into his part; but his passage led to the father's cellars, and they were open to the father's part of the house. The shop was broken into. The judges thought that by reason of the internal communication, the son's part continued part of the father's house, and held a conviction for the burglary of the father's house right; *Rex v. Sifton*, R. & R. C. C. 202. If a house is let to A., and a warehouse under the same roof, and with an internal communication to the house, to A. and B.; the warehouse, in an indictment for burglary, cannot be described as the dwelling-house of A.; *Rex v. Jenkins*, id. 244. A building separated from the dwelling-house by a public road, however narrow, is not parcel of the dwelling-house; but if it is made a sleeping place for any of the servants of the dwelling-house, it may be deemed a distinct dwelling-house, for the purposes of burglary; *Rex v. Westwood*, id. 495. If the owner of a cottage permits one of his workmen with his family to live there free of rent and taxes, and he lives there, principally, if not wholly, for his own benefit, it may be described as the workman's dwelling-house; *Rex v. Jobling*, id. 525; and see *Rex v. Margetts*, 2 Leach, 930. Where a warehouseman, with his family, lived in a house of his master's, for which, and

there must be a breaking and an entry;

3. As to the *manner* of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars (*f*). There must in general be an actual breaking; not a mere legal *clausum fregit*, by leaping over invisible ideal boundaries, which may constitute a civil trespass, but a substantial and forcible irruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window: picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person

(*f*) 1 Hal. P. C. 551.

for coals, he paid his master a rent of 11*l.* a year, the master taking 9*l.* a year less than he could have got from an ordinary tenant, in consideration of the security thus afforded to the premises, it was held that the warehouseman occupied as tenant and not as servant, and that an indictment for burglary, laying the house to be the dwelling-house of the master, was bad; *Rex v. Jarvis*, R. & M. C. C. 7; and see *Rex v. Camfield*, S. P. id. 42. If a burglary be committed in the house of a married woman living apart from her husband, it must be described as the dwelling-house of the husband; *Rex v. Farre*, Kel. 43; *Rex v. French*, R. & R. C. C. 491; *Rex v. Wilford*, id. 517. If a burglary be committed in the lodgings or chambers of servants of a corporation, the house must be described as the dwelling-house of the corporation; *Rex v. Picket*, 2 East, P. C. 501; *Rex v. Maynard*, id. *ibid.*

With respect to the new provisions contained in §§ 13 & 14 of the new statute, it would seem that any building which before the passing of this statute would have been the subject of burglary, by reason of its being within the curtilage, may now be the subject of an indictment under § 14. For such cases, and for others appearing to illustrate the new enactments; see *Rex v. Hancock*, R. & R. C. C. 170;

Rex v. Bennett, id. 289; *Rex v. Davis*, id. 322; *Rex v. Chalking*, id. 334; *Rev v. Lithgo*, id. 357; *Rex v. Clayburn*, id. 360; *Rex v. Walters*, R. & M. C. C. 13; 2 East, P. C. 492. The main question in such cases will be, what shall be considered as being within the curtilage, which, in the *Termes de la Ley*, is defined to be, a garden, yard, field, or piece of void ground, lying near, and belonging to, the messuage. Such garden, &c. must be connected with the messuage by one uninterrupted fence or enclosure of some kind, and perhaps such fence may more properly be termed the curtilage, than the ground lying within it. An indictment under the new section must aver that the building was within the curtilage of the prosecutor's dwelling-house, and that it was occupied therewith by the prosecutor: but it would seem that it need not aver that the building was one in which burglary could not be committed; see *Rex v. Robinson*, R. & R. C. C. 321. The other clauses of this statute, namely, § 10, as to sacrilege, or burglary and stealing in a church or chapel; § 12, as to house-breaking, and stealing in a house; and § 15, as to robbery in a shop; will be more properly the subjects of consideration and exposition in the succeeding chapter, 17, to which the reader is referred.

leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is so (*g*). But to come down a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit (*h*). So also to knock at a door, and upon opening it to rush in, with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was *no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process (*i*). And so, if a servant opens and enters his master's chamber door with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another's door, with such evil intent; it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both (*k*): for the servant is doing an unlawful act, and the opportunity afforded him, of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient: as to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries (*l*). The entry may be before the breaking, as well as after: for by statute 12 Ann. c. 7, if a person enters into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, or, being in such house, shall commit any felony; and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it: Lord Bacon (*m*) holding the affirmative, and Sir Matthew Hale (*n*) the negative. But it is universally agreed, that there must be both a breaking, either in fact or

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(*g*) 1 Hal. P. C. 553.

1 Hawk. P. C. 103.

(*h*) 1 Hawk. P. C. 102; 1 Hal. P. C. 552.(*l*) 1 Hal. P. C. 555; 1 Hawk. P. C. 103; Fost. 103.(*i*) 1 Hawk. P. C. 102.(*m*) Elem. 65.(*k*) Stra. 881; 1 Hal. P. C. 553;(*n*) 1 Hal. P. C. 554.

by implication, and also an entry, in order to complete the burglary (10).

(10) The 12 Anne, c. 7, together with the other statutes relating to the same subject, was repealed by the 7 & 8 Geo. IV. c. 27; but the observations in the text continue equally applicable under the new law. As to what is a sufficient breaking: Where a window opens upon hinges, and is fastened by a wedge, so that pushing against it will open it; forcing it open, by pushing against it, is sufficient to constitute a breaking: *Rex v. Hall*, R. & R. C. C. 355. Pulling down the sash of a window is a breaking, though it has no fastening, and is only kept in its place by the pulley weight; it is equally a breaking though there is an outer shutter which is not put to; *Rex v. Haines*, id. 451. Lifting the door flap of a mill, not otherwise fastened than by its own weight, is a breaking; *Brown's case*, 2 Russell, 902. The prisoner broke the glass of the prosecutor's side door on the Friday night, with intent to enter at a future time, and actually entered on the Sunday night. The judges held this burglary, the breaking and entering being both by night, and the breaking being with intent afterwards to enter; *Rex v. Smith*, R. & R. C. C. 417. Getting into the chimney of a house is a sufficient breaking and entering to constitute burglary, though the party does not enter any of the rooms of the house; *Rex v. Brice*, id. 450, 2 C. & P. 417. On the trial of a prisoner at Cambridge Sir M. Hale was doubtful whether this was burglary, and so were some others; but upon examination it appeared that, in the prisoner's creeping down, some of the bricks of the chimney were loosened, and fell into the room, which, says Sir M., put it out of question, and direction was given to find it burglary; 1 Hal. 551. This refined distinction has called forth an excellent comment from the able author of "Principles of

Penal Law," who observes, "it would not be easy for any man, whose understanding hath not the advantage of a professional education, to conceive, how the nature of the crime should be varied by so trivial an accident. Such deviations of sound sense into sophistry, are too often the consequences of legal reasoning." Breaking a window; taking out a piece of glass, by drawing or bending the nails, or other fastenings; drawing a latch, where a door is not otherwise fastened; picking a lock with a false key; putting back the lock of a door, or fastening of a window, with an instrument; turning the key where the door is locked on the inside; or unloosening any other fastening which the owner has provided, are all instances of a breaking; 2 East, P. C. 487. If a thief enter by an outer door or window which is open, yet if he turn the key of, or unlatch, a chamber door, this is a breaking; *Rex v. Johnson*, id. 488. A servant in the house may by opening a chamber door make a breaking for the purpose of burglary; Id. *ibid.*; see also Kel. 67; *Rex v. Gray*, 1 Stra. 481. But the breaking may be constructive also; as gaining admission under pretence of business; 2 Hawk. P. C. c. 17, § 8, or by colour of law, as under a fraudulent distress, &c.; 1 Russell, 9; taking lodgings with a felonious intent and robbing the landlord; 2 East, P. C. 485; bribing a servant to shew a mansion and then robbing it, id. *ibid.*; and opening a door to a burglar and allowing him to pillage the house and to escape; id. 486. But there must be some breaking, actual, or constructive. If a man leave his door or window open, and a thief enter and take away the goods, this is no burglary, id. 485. If a cellar window have an aperture to admit light and air, and a thief enters by going through it in the night, this is no

4. As to the *intent*; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, *a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created so by statute; since that statute, which makes an offence felony, gives it incidentally all the properties of a felony at common law (o) (11).

the intent must be felonious, but need not be carried into execution:

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(o) 1 Hawk. P. C. 105.

burglary; *Rex v. Lewis*, 2 C. & P. 628. And where the prisoner broke out of a cellar by lifting up a heavy flap by which the cellar was closed on the outside next the street, the flap not being bolted, though it had bolts, six of the judges were of opinion that there was a sufficient breaking to constitute burglary, and six were of a contrary opinion; *Rex v. Callan*, R. & R. C. C. 157. If A enter into the house of B. by night, and break open a chest and take away goods, without breaking open an inner door, this is no burglary, because the chest is no part of the house; 2 East, P. C. 488; 1 Hale, P. C. 555. *Quære*; whether this would apply to the doors of cupboards, presses, closets, or counters.

As to what is a sufficient entry: Introducing the hand between the glass of an outer window and inner shutter, is sufficient entry to constitute burglary; *Rex v. Bailey*, R. & R. C. C. 341. Where in breaking a window in order to steal property from the house, the prisoner's finger went within the house; it was held that there was a sufficient entry; *Rex v. Davis*, id. 499. And it may be taken generally that there is a sufficient entry to constitute burglary, if the thief breaks the house, and intro-

duces his body or any part thereof, as his arm, his hand, or even his finger, or if he puts a gun or pistol in at a window which he has opened, or a hole which he has made, with intent to murder, or a hook or any other engine, with intent to steal; 3 Inst. 64; 2 East, P. C. 487. But where the prisoner had bored through the door of a dwelling-house with a centre-bit, the point of which must have gone beyond its inner surface, the entry was held to be incomplete, the centre-bit being employed merely to effect the breach, and of no avail towards the commission of the projected felony, after the breach was effected; *Hughes's case*, 1 Leach, 406.

(11) If the indictment states, or the evidence shews, that the intent of the burglar was only to commit a trespass, as to beat a person in the house, the offence will not be burglary, even though murder be the consequence of such beating; for the murder, though it must have resulted from a felonious intent at the time of the beating, is not conclusive evidence of a felonious intent at the time of the breaking and entering; 2 East, P. C. 509. The felony intended may be one either at common law or by statute; 1 Hawk.

a capital felony
by statute.

Thus much for the nature of burglary; which is a felony at common law, but within the benefit of clergy. The statutes, however, of 1 Edw. VI. c. 12, and 18 Eliz. c. 7, take away clergy from the principals, and that of 3 and 4 W. and M. c. 9. from all abettors and accessories before the fact (*p*) (12). And, in like manner, the laws of Athens, which punished no simple theft with death, made burglary a capital crime (*q*).

(*p*) Burglary in any house belonging to the Plate Glass Company, with intent to steal the stock or utensils, is by statute 13 Geo. III. c. 38, declared

to be single felony, and punished with transportation for seven years (13).

(*q*) Pott. Antiq. b. 1, c. 26.

P. C. c. 17, § 33: but it must be described correctly, and any variance on that subject between the indictment and the evidence will be fatal. Thus, where one was indicted for burglary in a stable, with intent to destroy a gelding, and it appeared that the gelding was to have run for a wager, and the prisoner maimed him to prevent his running, of which maiming he died; it was held that the indictment could not be supported: for the prisoner's intent was

not to commit a felony by killing the animal, but only a trespass to prevent his running; *Dobb's case*, 2 East, P. C. 513; see also *Rex v. Knight*, id. 510; 1 Hale, P. C. 561; 1 Hawk. P. C. 136; and the cases there collected.

(12) All repealed by 7 & 8 Geo. IV. c. 27; vide *ante*, 227, note (10).

(13) This provision is revised and re-enacted by § 33 of 33 Geo. III. c. 17, which by § 34 is made a public act.

CHAPTER XVII.

OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next and last species of offences against private subjects, are such as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; *larceny*, and *malicious mischief*: and one, that is equally injurious to the rights of property, but attended with no act of violence; which is the crime of *forgery*. Of these three in their order.

Offences affecting the property of individuals, are, larceny, malicious mischief, and forgery.

I. Larceny, or *theft*, by contraction for latrocinium, *latrocinium*, is distinguished by the law into two sorts; the one called *simple* larceny, or plain theft unaccompanied with any other atrocious circumstance; and *mixed* or *compound* larceny, which also includes in it the aggravation of a taking from one's house or person (1).

I. Larceny is of two kinds, simple, and compound.

(1) By statute 7 & 8 Geo. IV. c. 29, § 2, it is enacted, "That the distinction between grand and petty larceny shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the commencement of this act; and every court, whose power as to the trial of larceny, was before the commencement of this act limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessaries to such larceny."

By § 3, every person convicted of simple larceny, or of any felony thereby made punishable like simple larceny, shall (except in the cases thereafter otherwise provided for) be liable to

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transportation for seven years, or imprisonment not exceeding two years; and, if a male, to one, two or three public whippings; and by § 4, where the sentence is imprisonment, the courts have a discretionary power to award hard labour or solitary confinement in addition. This observation has been introduced here that the reader may observe, how far the present provisions of the law vary from the text, in his progress through this important chapter, and to remind him that the subtle distinctions between grand and petty larceny are now entirely abolished.

By § 61, in every felony punishable under this act, every principal in the second degree, and every accessary before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree; and every accessary after the fact, (except only a receiver of stolen property,)

Simple larceny is either grand or petit, according to the value of the property stolen.

And, first, of *simple* larceny: which, when it is the stealing of goods above the value of twelve pence, is called *grand* larceny; when of goods to that value, or under, is *petit* larceny: offences, which are considerably distinguished in their punishment, but not otherwise. I shall therefore first consider the nature of simple larceny in general; and then shall observe the different degrees of punishment inflicted on its two several branches.

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Simple larceny then is, “the felonious taking, and carrying away, of the personal goods of another.” This *offence certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were established. How far such an offence can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual, in the occupation of what he has seized to his present use, seems to be the only offence of this kind incident to such a state. But unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen (*a*), any violation of that property is subject to be punished by the laws of society: though how far that punishment shall extend, is matter of considerable doubt. At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

1. There must be a taking

1. It must be a *taking* (2). This implies the consent of

(*a*) See vol. II. page 8, &c.

shall on conviction be liable to imprisonment for any term not exceeding two years; and every person aiding, abetting, counselling, or procuring the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender. As to the venue in cases of larceny, see 7 Geo. IV. c. 64, §§ 12 & 13.

(2) What is deemed a sufficient taking may be deduced from the following, amongst many other cases: where a master places property in the care of a servant for a particular purpose as to leave it at the house of a friend, or to procure change, or deposit

with a banker, the servant will be guilty of felony if he apply it to his own use, for it still remains in the constructive possession of the master; 2 Leach, 870. So also where a banker's clerk is sent to the money room to bring cash for any particular purpose, and he abstracts some for his own use, he is guilty of larceny; 1 Leach, 251, 344. The assent of a prosecutor to give facility to the commission of a larceny, for the purpose of detecting the offenders, does not do away the felony, although the property is not taken against his will. Thus where the owner of goods knowing of an intention in the prisoners to steal them, they having

the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larceny without consent of the owner, and animo furandi.

plotted so to do with his servant, desired his servant to carry on the business with a view to the detection of the thieves; in consequence of which the servant, with the consent of his master, agreed with the prisoners to open the outer door to them, and let them into the house, when they broke open inner apartments, and took the goods: held, by a majority of the judges, to be larceny, one (only) doubting, because of the owner's assent and partial encouragement of the felony by means of his servant; *Rex v. Egginton*, 2 Leach, 913; 2 B. & P. 508; S. P. *Rex v. Dannelly*, 2 Marsh, 571; 2 East, P. C. 494, 666. If a bag of wheat be delivered to a warehouseman for safe custody, and he take all the wheat out of the same, and dispose of it, it is larceny; *Rex v. Brazier*, R. & R. C. C. 337. Where there is a plan to cheat a man of his property under colour of a bet, and he parts with the possession only, to deposit as a stake with one of the confederates, the taking by such confederate will be felonious, *id.* 413. To make a taking felonious it is not necessary it should be done *lucri causa*; taking with an intent to destroy, will be sufficient to constitute the offence of larceny, if done to serve the prisoner or another person, though not in a pecuniary way. By six v. five judges; *Rex v. Cabbage*, *id.* 292; 2 Russell, 94. Where a banker's clerk took notes from the till, under colour of a check from a third person, which check he obtained by having entered a fictitious balance in the books in favour of that person: held a felony, the obtaining the check fraudulently being nothing more than mere machinery to effect his purpose; *Rex v. Hammon*, R. & R. C. C. 221; S. C. 4; Taunt. 304. Fraudulently obtaining the mail bags by delivery from one in the post-office to the prisoner, is a taking and stealing out of

the post-office; *Rex v. Pearce*, 2 East, P. C. 663. If a person steal his own goods from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king, yet if the bailee had an interest in the possession, and could have withheld it from the owner, the taking is a larceny. By seven judges v. four; *Rex v. Wilkinson*, R. & R. C. C. 470. So if a part owner of property steal it from the person in whose custody it is, and who is responsible for its safety, he is guilty of larceny. So, where a clerk embezzles a bill of exchange, which he received from his master with directions to enclose and transmit it in a letter by post to a correspondent; this has been held larceny; 2 East, P. C. 565; 2 Ch. C. L. 2d ed. 917, b. It is larceny for a person hired for the special purpose of driving sheep to a fair, to convert them to his own use, he having the intention to do so at the time of receiving them from the owner; 1 R. & M. C. C. 87. Where property, which the prosecutor had bought, was weighed out in the presence of his clerk, and delivered to his carman's servant to cart, who let other persons take away the cart, and dispose of the property, for his benefit jointly with that of the others, the carman's servant, as well as the others, were held guilty of larceny at common law; *Rex v. Harding*, R. & R. C. C. 125. If a party finding property knows the owner; or if there be any mark upon it by which the owner can be ascertained, and instead of returning it, converts it to his own use, such a conversion is a felonious taking; *Rex v. James*, 2 Russell, 102. Fraudulently obtaining a chest of tea from the India House, though by means of a regular request paper and permit, has been held a larceny; *Rex v. Hough*, R. & R. C. C. 163. But where a person obtained possession of a hat

ceny. As, if A. lends B. a horse, and he rides away with him; or, if I send goods by a carrier, and he carries them

from the maker, which had been ordered by a third person, by sending a boy for it in the name of such third person: held that this did not amount to larceny. The distinction between these two last cases, which on a first view seem to be undistinguishable, appears to be this. In the former, the goods were obtained with a felonious design, the owner *still retaining* his right of property in them; in the latter, although the offender obtained the hat under false pretences, or rather fraudulent circumstances, the owner parted with his property voluntarily. And where the defendant obtains silver on pretence of sending a half-guinea presently in exchange, it is no felony; 2 East, P. C. 672. So writing a letter in the name of a third person to borrow money, which the writer obtains by that fraud, is only a misdemeanor; *Id.* 673. So if the owner parts with the possession of goods for a particular purpose, and the bailee when that purpose is executed, neglects to return them, and afterwards disposes of them, if he had not a felonious intention when he originally took them, his subsequent withholding and disposing of them, does not constitute a felonious taking, or make him guilty of felony; *Rex v. Banks*, R. & R. C. C. 441. So if the master of a foreign vessel captured by a British ship, and carried into port, takes goods from the vessel after she has been condemned as a prize, it does not amount to larceny, unless there is evidence that he took them for the purpose of converting them to his own private use; *Rex v. Van Muyen*, R. & R. C. C. 118. So the clandestinely taking away articles to induce the owner (a servant girl) to fetch them, and thereby to give the offender an opportunity to solicit her to commit fornication with him, is not felonious; *Rex v. Dickinson*, *id.* 420. The prisoner went

into a shop in London and purchased jewellery, saying that he would pay in cash, and the seller agreed to deliver the articles at the coach-office annexed to the inn where the prisoner stated he lodged. The seller made out an invoice, and took the goods as directed, when the prisoner said he had experienced a disappointment in not receiving money he expected by letter. At this moment a two-penny post letter was handed to him, which he opened in the presence of the vendor, and said he had a friend to meet at Tom's Coffee-house at seven, who would supply the money. The goods were left, and the seller went home. The prisoner had taken a place by the mail, which he countermanded, and absconded with the goods. The vendor swore that he considered the goods sold if he got his cash, but not before. It was left to the jury to say whether the prisoner had any intention of buying and paying for the goods, or whether he gave the order merely to get possession of them, to convert them to his own use. The jury found the latter, and the prisoner was convicted, which conviction was held right by the twelve judges; *Rex v. Campbell*, Car. C. L. 280; 1 M. & P. 373. So if a person having ordered a tradesman to bring a parcel of goods to his house, look out a certain quantity, ask the price of them, separate them from the rest, and then, by sending the tradesman back on pretence of requiring other goods, take the opportunity of running away with the goods he had looked out, with intent to steal them, it is larceny, for as the sale was not completed, the possession of the property still remained in the tradesman; *Rex v. Sharpless*, 1 Leach, C. C. 92. Where two planned to rob a girl of some coats, and one got her to go with him that he might get some money to buy them of her, and she left the coats

away; these are no larcenies (b) (3). But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are lar-

(b) 1 Hal. P. C. 504.

with the other, who absconded with them: held, that the receipt by the one amounted to a felonious taking of the coats by both; *Rex v. County*, 2 Russell, 127, 175. A bureau was delivered to a carpenter to repair, and he discovered cash in a private drawer, which he had unnecessarily broken open, that part not requiring repair, and converted the money to his own use: held sufficient to constitute a felonious taking; *Cartwright v. Green*, 2 Leach, C. C. 952.

(3) In the case of a delivery of a horse upon hire or loan, if such delivery were obtained *bonâ fide*, no subsequent wrongful conversion *pending the contract* will amount to larceny; and so of other goods. But when the purpose of the hiring or loan for which the delivery was made, has been ended, larceny may be committed by a conversion of the goods; 2 Russell, 1089. In every case of this sort it is for the jury to say from the circumstances what was the original intention of the party; *Rex v. Jackson*, York Spring Assizes, 1832, per Patteson, J.; and the rule above adverted to can only obtain where the jury find that the possession was obtained *bonâ fide* in the first instance: for if A. obtains goods *animo furandi*, or receives them harbouring at the time an intention wrongfully to convert them to his own use, he is guilty of larceny. Thus, where the prisoner, who was employed to drive sheep to a fair, drove them in a contrary direction, and sold ten of them the same morning he received them, and the jury found that at the time he received them, he intended to convert them to his own use; this was held to be larceny; *Rex v. Stock*, R. & M. C. C. 87. We have

seen that the rule applies only while the contract of bailment continues; 2 Russell, 1089; therefore, if a carrier takes goods to the place appointed, and afterwards takes them away and converts them, that will amount to larceny; 3 Inst. 107. And the contract may be determined before its regular completion by the tortious act of the bailee; as, in the case mentioned in the text, if a carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part of the contents, he is guilty of larceny; 3 Inst. 107; 1 Hale, 105. Where forty sacks of wheat were sent for safe custody to a warehouseman, who emptied several of the sacks, sold the wheat, and substituted other wheat of an inferior quality; the judges were unanimously of opinion, that the taking the whole of the wheat out of one sack was as much a larceny, as the taking of a part merely; *Rex v. Brazier*, R. & R. C. C. 317.

And if the possession of property is obtained by any contrivance *animo furandi*, as by pretending to find a valuable ring, cutting cards, or laying wagers, or by undertaking to exchange a note into cash, or gold into silver, it amounts to felony. See the respective cases of *Patch*, *Horner*, and *Aickles*, in Leach, 206, 226, 239.

But where the sale of a horse or any other article is complete, and possession delivered to the buyer, who rides away with the horse, or carries off the article, without paying for it, no felony is committed. For the property as well as possession is in that case parted with, and the owner is defrauded, not of the horse or article, but only of its price, and he has his remedy by an action to recover it.

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ceries (c); for here the *animus furandi* is manifest; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect (4). But bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust (5). But by statute 33 Hen. VI. c. 1, the servants of persons deceased, accused of embezzling their master's goods, may by writ out of chancery, issued by the advice of *the chief justices and chief baron, or any two of them, and proclamation made thereupon, be summoned to appear personally in the court of King's Bench, to answer their masters' executors in any civil suit for such goods; and shall, on default of appearance, be attainted of felony. And by statute 21 Hen. VIII. c. 7, if any servant embezzles his master's goods to the value of forty shillings, it is made felony; except in apprentices, and servants under eighteen years old (6). But if he had not the possession, but only

(c) 3 Inst. 107.

(4) It has been decided that if a hackney coachman converts to his own use a parcel accidentally left in his coach by a passenger, it is felony, if he knows the owner, or if he took him up or set him down at any particular place where he might have inquired for him; *Rex v. Wynne*, 2 East, P. C. 664; 1 Leach 413; *Rex v. Lamb*, 2 East, P. C. 664; *Rex v. Seare*, 1 Leach 415, n. It has been attempted to place a check upon this very frequent species of larceny by statute 1 & 2 W. 4, c. 22, § 49, by which drivers of hackney carriages in the metropolis are required, under a penalty of 20*l.*, to deposit property left in their carriages at the head Stamp Office, which, if not claimed within a year, is to be delivered up to the driver, if applied for; if not, to be sold on the public account.

(5) But it seems that in every case the judges now determine, that the property of the master delivered by him into the custody of the servant still remains in the possession of the master, and if it is embezzled by the servant or converted to his use, he is guilty of felony.* And when servants are convicted of robbing their masters, as the security of families so much depends upon their honesty, and as the violation of the confidence reposed in them is a high aggravation of the crime, they are always punished with the utmost rigour which the law admits.—CH.

(6) The above statutes, with others on the same subject, are repealed by the 7 & 8 Geo. IV. c. 27; and by the 7 & 8 Geo. IV. c. 29, § 46, any clerk or servant stealing any chattel, money,

* See the next note.

the care and oversight of the goods, as the butler of plate, the shepherd of sheep, and the like, the embezzling of them

or valuable security belonging to, or in the possession or power of his master, is punishable with transportation for any term not exceeding fourteen years, and not less than seven, or with imprisonment for any term not exceeding three years, with whippings. An indictment, on one of the repealed statutes, 3 Geo. IV. c. 38, § 2, charged that A, on &c., being the servant of B., on the same day, &c., one gold ring, &c., then and there being in the possession of A., and being his goods and chattels, feloniously did steal : held, that the fair import of the charge was, that A. was the servant of B. at the time when the theft was committed, and that the indictment therefore warranted judgment of transportation for 14 years; *Rex v. Somerton*, 7 B & C. 463. Sect. 47 enacts, that any clerk or servant, or person employed as such, receiving or taking, by virtue of such employment, into his possession, any chattel, money, or valuable security, for, or in the name, or on the account of his master, and fraudulently embezzling the same, or any part thereof, shall be deemed to have feloniously stolen the same from his master, although such chattel, &c., was not received into the master's possession otherwise than by the actual possession of such clerk or servant, or other person so employed, and shall be liable to any of the punishments set forth in § 55. By § 48, "for preventing the difficulties that have been experienced in the prosecution of the last-mentioned offenders," it is enacted, "that it shall be lawful to charge in the indictment, and proceed against the offender for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts, and

in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly." Each act of embezzlement should be set forth in a separate count, and the prosecutor cannot be compelled to elect which he will singly proceed upon. The indictment need not state from whom the money alleged to have been embezzled, was received; *Rex v. Beacall*, 1 C. & P. 454. The day laid is not material. The distinctions between larceny and embezzlement are often extremely nice and subtle, and it is sometimes difficult to say under which head the offence ranges. Thus a prisoner was indicted at common law for stealing five pounds in silver. His master had given him a 5*l.* note to change, which having procured, he absconded with : held embezzlement and not larceny; *Rex v. Sullens*, Car. C. L. 319. The following cases, although decided upon Acts now repealed, appear to be applicable to the new Act. An apprentice, though under the age of eighteen, has been considered a servant within one of the repealed statutes; *Rex v. Mellish*,

is felony at common law (*d*). So if a guest robs his inn or tavern of a piece of plate, it is larceny: for he hath not the

(*d*) 1 Hal. P. C. 506.

R. & R. C. C. 80. Where the owner of a colliery employed the prisoner as captain of one of his barges to carry out and sell coals, and paid him for his labour by allowing him two-thirds of the price for which he sold the coals, after deducting the price charged at the colliery: held that the prisoner was a servant within the meaning of 39 Geo. III. c. 85; *Rex v. Hartley*, *id.* 139. So a person employed to travel upon commission for orders, and to collect debts, is a clerk, though he was employed by many different houses on each journey, and paid his own expenses out of his commission on each journey, and did not live with any of his employers, nor act in any of their counting-houses; *Rex v. Carr*, *id.* 198. So, where a servant received money for his master for an article made of his master's materials, it was held to be within the 39 Geo. III. c. 85, if he embezzled it, though he made the article, and was to have given a proportion of the price for making it; *Rex v. Hoggin*, *id.* 145. So where property had been in the possession of the prisoner's masters, and they intrusted the custody of it to a third person to try the honesty of their servant, who received it from such third person and embezzled it; this was held an offence under 39 Geo. III. c. 85; *Rex v. Hedge*, *id.* 160. But, it has been held, that an indictment under that statute must describe specifically some of the property embezzled. Where a prisoner pleaded guilty to an indictment charging, "that he received and took, on account of his master, divers sums of money, amounting in the whole to a large sum of money, to wit the sum of 10*l.*, and embezzled the same," and was adjudged to be transported: held, that the indictment was bad; and the court re-

versed the judgment, and refused to remand the prisoner; *Rex v. Flower*, 8 D. & R. 512; 5 B. & C. 736. It was also held, that a man was sufficiently a servant within that Act although he was only occasionally employed, when he had nothing else to do; and that it was sufficient that he was employed to receive the money he embezzled, though receiving money was not his usual employment, and although it was the only instance in which he was so employed; *Rex v. Spencer*, *id.* 299. If a person is employed as the servant of a corporation, and embezzles their money, he is guilty of felony, though he was not duly appointed their servant, nor even appointed at all under their common seal; *Rex v. Beacall*, 1 C. & P. 457. So, if he receives money on his employer's account, and embezzles it, he is guilty of felony, though his employers had no right to it, and were wrong doers in receiving it; *Id.* 454. A person employed as a journeyman in the trade of a miller, and in the habit of receiving money on his master's account, is a servant within the 39 Geo. III. c. 85; per Richards, C. B. in *Rex v. Barker*, D. & R. N. P. C. 19. Where a defendant had established a saving bank, consisting of 130 members, each of whom paid a weekly subscription of 2*s.* 1*d.*, the odd penny being paid to the defendant for the trouble of managing the affairs of the bank, the funds of which were to be disposed of once a week by lottery, consisting of 129 blanks and one prize, amounting to 13*l.*, which was to go to the holder of the fortunate ticket; and the defendant having absconded, after receiving from one of the subscribers deposits to the amount of 10*l.* 8*s.*, without receiving any benefit there-

possession delivered to him, but merely the use (*e*), and so it is declared to be by statute 3 & 4 W. & M. c. 9, if a lodger runs away with the goods from his ready furnished lodgings (7). Under some circumstances also a man may be guilty of felony in taking his own goods: as if he steals them from a pawnbroker, or any one to whom he hath delivered

(*e*) 1 Hawk. P. C. 90.

from: it was held, per Park, J., that the defendant was not indictable under the 52 Geo. III. c. 63, for embezzling money as an "*agent*," or as a person having the possession of money "*for safe custody*;" and that, as the defendant had never at any one time more than 2s. 1d. in her possession belonging to the prosecutrix, though she had received, in the aggregate, the whole sum of 10l. 8s., the indictment, charging her with receiving that sum generally, could not be supported. *Quære*, whether money can be considered as "*personal effects*," within the meaning of the 52 Geo. III. c. 63; *Rex v. Mason*, D. & R. N. P. C. 22. By statute 5 Geo. IV. c. 20, § 10, persons employed in the post-office embezzling notes, parliamentary proceedings, or newspapers, &c., are guilty of a misdemeanor, and punishable by fine and imprisonment, the offence to be tried either where committed or where the offender is apprehended.

By 7 & 8 Geo. IV. c. 29, § 49, bankers, merchants, brokers, attornies, and other agents, embezzling money intrusted to them to be applied to any special purpose, or embezzling any goods, or valuable security intrusted to them for safe custody, or for any special purpose, are guilty of a misdemeanor, and punishable in any of the modes pointed out in § 46. Sect. 50 provides, that the Act shall not affect trustees or mortgagees; nor bankers, &c. receiving money due on securities, or disposing of securities on which they have a lien. By § 51, factors pledging for their own use any goods, or docu-

ments relating to goods, intrusted to them for the purpose of sale, are guilty of a misdemeanor, and punishable by transportation for fourteen or seven years, or by fine and imprisonment, as the court shall award; the clause not to extend to cases where the pledge does not exceed the amount of their lien. And by § 52, these provisions as to agents shall not lessen any remedy which the party aggrieved previously had, at law or in equity. A person intrusted, as a private friend, with a bill to get it discounted, and converting it to his own use, is not an agent within the meaning of the Act; *Rex v. Prince*, 2 C. & P. 517. As to embezzlement by bankrupts, see *ante*, 156, note (3).

(7) Repealed by 7 & 8 Geo. IV. c. 27; and by 7 & 8 Geo. IV. c. 29, § 45, it is enacted, that if any person shall steal any chattel or fixture let to be used by him in or with any house or lodging, he shall be guilty of felony, and be punished as for simple larceny; and the indictment may be preferred in the common form as for larceny, and as if the offender were not a tenant or lodger, and in either case the property may be laid in the owner or person letting to hire. In *Healey's case*, R. & M. 1, it was considered unnecessary for the indictment to state by whom the lodging was let, the judges holding that the letting might be stated either according to the fact, or according to the legal operation of the contracts. The statement as to the party by whom the lodging is let, would be regulated by this case under the present act.

and intrusted them, with intent to charge such bailee with the value (8); or if he robs his own messenger on the road, with an intent to charge the hundred with the loss according to the statute of Winchester (f).

2. There must be a carrying away; the slightest removal is sufficient.

2. There must not only be a taking, but a *carrying away*; *cepit et asportavit* was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs; these have been adjudged sufficient carryings away, to constitute a larceny (g). Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it; this is larceny (h) (9) (10).

(f) Foster, 123, 124.

(h) 1 Hawk. P. C. 93.

(g) 3 Inst. 108, 109.

(8) If a man steal his own goods from his own bailee, though he has no intent to charge the bailee, but his intent was to defraud the king, yet, if the bailee had an interest in the possession, and could have withheld it from the owner, the taking is a larceny; *Rex v. Wilkinson*, R. & R. C. C. 470.

(9) If a purse is tied to the pocket by a string, or goods to a counter in a shop, and the purse is taken out of the pocket, or the goods from the counter, yet the larceny is not complete, if the string remain unbroken; 2 East, P. C. 556. But where a man snatched an ear-ring from a lady's ear, and afterwards dropped it in her hair, it was held a sufficient carrying away to constitute a robbery; *Lapier's case*, Leach, 264. The removal of a parcel from one end of a waggon to the other, with an intent to steal, amounts to a larceny; *Ibid.* 204. But where a bale of goods was raised and placed upon its end in a perpendicular posture, this was thought not to be a sufficient carrying away, there not being a complete removal from the space it before occu-

pied; *Ibid.* And where a man was stopped and ordered by the prisoner to put down upon the ground a parcel, which he was carrying, but which the prisoner did not afterwards take up, this was held not a sufficient asportation to complete the crime of robbery; *Farrel's case*, *ibid.* 266.—CH.

(10) As to what is, or is not, a sufficient removal of the goods to constitute a larceny, see *Rex v. Simpson*, Kel. 31; *Rex v. Coslet*, 1 Leach, 256; *Rex v. Cherry*, 2 East, P. C. 256; *Anon.* *ibid.*; *Rex v. Wilkinson*, 1 Hale, 508; 2 Russell, 1034, 5; 1 Hawk. c. 19, § 25, et seq.

Prisoner lifted up a bag from the bottom of a boot of a coach, but was detected before he had got it out: it did not appear to have been entirely removed from the space it originally occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part occupied: held a complete asportation; *Rex v. Walsh*, 1 R. & M. C. C. 14.

3. This taking, and carrying away, must also be *felonious*; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causâ* (i). This requisite, besides excusing those who labour under incapacities of mind or will, of whom we spoke sufficiently at the entrance of this book (k), indemnifies also mere trespassers, and other petty offenders. As, if a servant takes his master's horse without his knowledge, and brings him home again (11): if a neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I distrain another's cattle, or seize them: all these are misdemeanors and trespasses, but no felonies (l). The ordinary discovery of a felonious intent is where the party doth it clandestinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animus furandi*: wherefore they must be left to the due and attentive consideration of the court and jury (12).

3. Both the taking, and the removal, must be done *animo furandi*; the *quo animo* is a question for the jury.

4. This felonious taking and carrying away must be of *the personal goods of another*: for if they are things *real*, or savour of the realty, larceny at the common law cannot be committed of them (13). Lands, tenements, and heredita-

4. The property must be personal.

(i) Inst. 4, 1, 1.

(l) 1 Hal. P. C. 509.

(k) See page 20.

(11) But a servant *clandestinely* taking his master's corn, though solely for the purpose of giving it to his master's horses, has been held, by a majority of the judges, to be guilty of larceny; *Rex v. Morfit*, R. & R. C. C. 307. This decision has been frequently acted upon within the last few years, and is considered generally to be law, though there have been judges who have doubted about its propriety; and juries, where the object of taking the corn has been clearly proved to have been to give it to the horses, have not unfrequently acquitted the offender, contrary to the advice of the judge in point of law.

(12) See 1 Hale, 533; 2 East, P. C. 662, 3; *Rex v. Wynne*, 2 East, 664; 1 Leach, 467; 2 id. 952, 4; Kel. 82; 2 East, 674, 681. If a part owner of property steal it from the person in whose custody it is, and who is responsible for its safety, he is guilty of larceny; *Rex v. Bromley*, R. & R. C. C. 478.

(13) By statute 7 & 8 Geo. IV. c. 29, § 23, the stealing any description of writings relating to the title of real estates is punishable with transportation for seven years, or with fine and imprisonment at the discretion of the court; and, by § 24, these provisions are not to deprive the party ag-

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ments, either corporeal or incorporeal, cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass which depended on a subtlety in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immoveable (*m*). And if they were *severed by violence, so as to be changed into moveables; and at the same time, by one and the same continued act, carried off by the person who severed them; they could never be said to be taken *from* the *proprietor*, in this their newly acquired state of mobility, which is essential to the nature of larceny, being never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and comes again at *another* time, when they are so turned into personalty, and takes them away; it is larceny: and so it is if the owner, or any one else, has severed them (*n*). And now, by the statutes 4 Geo. II. c. 32, to steal, or rip, cut, or break, with intent to steal, any lead, or iron bar, rail, gate, or palisado, fixed to a dwelling-house or outhouse, or in any court or garden thereunto belonging, or to any other building, is made felony, liable to transportation for seven years (14): and to steal,

(*m*) See vol. II. page 16.

(*n*) 3 Inst. 109; 1 Hal. P. C. 510.

grieved of the remedies he now has, at law or in equity. This enactment is new. See 3 Inst. 109; 1 Hale, 110.

(14) By statute 7 & 8 Geo. IV. c. 29, § 44, stealing, ripping, cutting, or breaking with intent to steal any glass or woodwork belonging to any building, or any utensil or fixture made

of metal or other material fixed in or to any building whatsoever, or metal fixtures in land being private property, or for a fence to any house, garden, or area, or in any square, &c. is a felony punishable as in the case of simple larceny.

damage, or destroy underwood or hedges, and the like (15), to rob orchards or gardens of fruit growing therein (16), to steal or otherwise destroy any turnips, potatoes, cabbages, parsnips, pease, or carrots, or the roots of madder when growing, are (o) punishable criminally by whipping, small fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offence. (17) Moreover, the stealing by night of any trees, or of any roots, shrubs, or plants, to the value of 5s., is by statute 6 Geo. III. c. 36, made felony in the principals, aiders, and abettors, and in the purchasers thereof knowing the same to be stolen: and by statutes 6 Geo. III. c. 48, and 13 Geo. III. c. 33, the stealing of any timber trees therein specified (p), and of any root, *shrub, or plant, by day, or night, is liable to pecuniary penalties for the two first offences, and for the third is consti-

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(o) Stat. 43 Eliz. c. 7; 15 Car. II. c. 2; 31 Geo. II. c. 35; 6 Geo. III. c. 48; 9 Geo. III. c. 41; 13 Geo. III. c. 32.

(p) Oak, beech, chesnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, birch, poplar, alder, larch, maple, and hornbeam.

(15) By statute 7 & 8 Geo. IV. c. 30, § 19, persons maliciously destroying or damaging any trees, shrubs, or underwood, growing in any park, pleasure-ground, garden, orchard, or avenue, (in case the injury exceeds the sum of 1*l.*) shall be guilty of felony, and be punished with transportation for seven years, or imprisonment not exceeding two years, with public whipping in addition; and committing the offence on trees, &c. growing elsewhere, (where the injury exceeds 5*l.*) is subject to the same punishment. And by § 20, destroying such property wheresoever growing, of any value above one shilling, renders the offender liable to a fine of 5*l.* for the first offence; to hard labour and imprisonment not exceeding twelve months for the second offence, with whipping in addition; and to transportation or imprisonment as in the last section, as for a felony, for a third offence.

(16) By 7 & 8 Geo. IV. c. 29, § 42, stealing or destroying any plant, root, fruit, or vegetable production,

growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory, is punishable, for a first offence, with imprisonment and hard labour, not exceeding six calendar months, or a fine not exceeding 20*l.*, over and above the value of the articles stolen; and the second offence is felony, punishable as in the case of simple larceny.

(17) By 7 & 8 Geo. IV. c. 29, § 43, the first offence is punishable with hard labour and imprisonment not exceeding one month, or with a fine not exceeding 1*l.*, besides the value of the articles stolen, and the second offence with whipping, and imprisonment for a term not exceeding six months. The words of the act are stealing or destroying "any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land open or enclosed not being a garden, orchard, or nursery-ground."

tuted a felony liable to transportation for seven years (18). Stealing ore out of mines is also no larceny, upon the same principal of adherence to the freehold: with an exception only to mines of black lead, the stealing of ore out of which, or entering the same with intent to steal, is felony, punishable with imprisonment and whipping, or transportation not exceeding seven years; and to escape from such imprisonment, or return from such transportation, is felony without benefit of clergy; by statute 25 Geo. II. c. 10 (19). Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass (*q*): because they concern the land, or, according to our technical language, *savour* of the *realty*, and are considered as part of it by the law; so that they descend to the heir together with the land which they concern (*r*) (20).

Bonds, bills, &c. made the subjects of larceny by recent statutes.

Bonds, bills, and notes, which concern mere *choses in action*, were also at the common law held not to be such goods whereof larceny might be committed; being of no intrinsic value (*s*), and not importing any property in *possession* of the person from whom they are taken. But by the statute 2 Geo. II. c. 25, they are now put upon the same footing, with respect to larcenies, as the money they were meant to secure (21). By statute 15 Geo. II. c. 13, officers or ser-

(*q*) 1 Hal. P. C. 510; Stra. 1137.

(*s*) 8 Rep. 33.

(*r*) See vol. II. p. 428.

(18) By 7 & 8 Geo. IV. c. 29, § 38, persons stealing or destroying with intent to steal, any tree, shrub, or underwood, growing in any park, pleasure-ground, garden, or near houses, (where the injury exceeds the sum of 1*l.*,) are guilty of felony, and liable to be punished as in cases of simple larceny; and stealing, or damaging with intent to steal, such property elsewhere, above the value of 5*l.*, is declared felony, and liable to the same punishment. And, by § 39, stealing, or damaging with intent to steal, any trees, shrubs, &c., wheresoever growing, to the value of one shilling, is punishable with a fine of 5*l.* for the first offence; with hard labour, whipping and imprisonment,

not exceeding twelve months, for the second offence; and the third offence is felony, punishable as in case of simple larceny. There seems to be no punishment if the property stolen or destroyed be under the value of a shilling.

(19) By 7 & 8 Geo. IV. c. 29, § 37, stealing, or severing with intent to steal any ore, or other substance, from certain mines, is felony, and punishable as in case of simple larceny. The 25 Geo. II. c. 105, is repealed by 7 & 8 Geo. IV. c. 27.

(20) Vide note (13), *ante*, 232.

(21) Repealed by 7 & 8 Geo. IV. c. 27; and by 7 & 8 Geo. IV. c. 29, § 5, persons stealing any tally, order, or other security, either public or pri-

vants of the bank of England, secreting or embezzling any note, bill, warrant, bond, deed, security, money, or effects, intrusted with them or with the company, are guilty of felony without benefit of clergy (22). The same is enacted by statute 24 Geo. II. c. 11, with respect to officers and servants of the South Sea company (23). And by statute 7 Geo. III. c. 50, if any officer or servant of the post-office shall secrete, embezzle, or destroy any letter or packet, containing any bank note or other valuable paper particularly specified in the act, or shall steal the same out of any letter or packet, he shall be guilty of felony without benefit of clergy. Or, if he shall destroy any letter or *packet with which he has received money for the postage, or shall advance the rate of postage on any letter or packet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony (24). Larceny also could not at common law be committed of treasure-trove, or wreck, till seized by the

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vate, relating to this country, or to any foreign state, or any debenture, deed, bond, bill, note, warrant, order, or other security for money, or any order for the delivery of goods, shall be guilty of felony, and punished as though they had stolen any chattel of equal value, according to the interest the parties have in the securities stolen; and all the documents enumerated in the act shall be deemed to be included in the words "valuable security."

A check on a banker, written on unstamped paper, payable to D. F. J., and not made payable to bearer, is not a valuable security within the meaning of the act; *Rex v. Yates*, Car. C. L. 273, 333.

(22) Upon this statute, Robert Aslett was indicted. He had been a confidential clerk in the bank, and had embezzled exchequer bills to an immense amount. But it was admitted on the part of the prosecution, that these bills were not valid exchequer bills, having not been duly signed by the auditor of the exchequer. The question was, therefore, whether they came under the description of any security or effects.

A majority of the judges were of opinion that these papers were securities or effects, as the government was as much bound in honour and justice to discharge them as if they were technically correct in all their parts.

The prisoner therefore received sentence of death, but as some of the judges were of a different opinion, he was not executed; Bos. & Pull. New. Rep. 1.—CH.

(23) See 2 East, P. C. 579. Where a bank clerk employed to post into the ledger, and read from the cash book, bank notes from 100*l.* to 1000*l.* value, and who, in the course of that occupation had, with other clerks, access to a file, upon which paid notes of every description were filed, took from that file a paid bank note for 50*l.*, it was held that the prisoner could not be considered as intrusted with the possession of this note, so as to bring him within the statute; *Rex v. Bakewell*, R. & R. C. C. 35. It seems doubtful whether a note once cancelled by the bank, is within the statute; *Id.*

(24) See 5 Geo. III. c. 25; 42 Geo. III. c. 81; and 52 Geo. III. c. 143, with respect to these offences;

king or him who hath the franchise: for till such seizure no one hath a determinate property therein. But, by statute 26 Geo. II. c. 19, plundering or stealing from any ship in distress, whether wreck or no wreck, is felony without benefit of clergy: in like manner as, by the civil law (s), this inhumanity is punished in the same degree as the most atrocious theft (25).

Animals, by nature wild, are not the subject of larceny, unless they are tamed.

Larceny also cannot be committed of such animals, in which there is no property either absolute or qualified; as of beasts that are *feræ naturæ*, and unreclaimed, such as deer, hares, and conies, in a forest, chase, or warren; fish, in an open river or pond: or wild fowls at their natural liberty (t). But if they are reclaimed or confined, and may serve for food, it is otherwise, even at common law: for of deer so enclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny

(s) Cod. 6, 2, 18.

(t) 1 Hal. P. C. 511. Fost. 366.

by the latter of which statutes, the provisions of the former are incorporated, and accessaries before the fact are ousted of clergy, and may be tried before the principal is convicted. In a case under 7 Geo. III. c. 50, where a person was indicted as charger and sorter, and was acquitted on this special count, it was held that he could not be convicted on a general count as a person employed in the post-office, on evidence that he was no otherwise employed than as a sorter; *Shaw's case*, 2 East, P. C. 580. A bill of exchange may be laid as a *warrant for the payment of money* within that statute; *Willoughby's case*, 2 East, P. C. 581. Stealing money out of a letter is not within that Act; *Skut's case*, 2 East, P. C. 582; Leach, 100. Where a person employed in the post-office secreted a letter containing a draft *not duly stamped*, it was held not to be an offence within the Act, the draft not being available; *Rex v. Pooley*, R. & R. C. C. 12. A stamper at the post-office, who purloins a letter for the purpose of delivering it

as a mis-sorted letter, with a view of obtaining the postage of it, cannot be capitally convicted of secreting a letter containing bills under the 52 G. III. c. 143, although the letter may in fact contain bills; *Rex v. Sharpe*, Car. C. L. 147. But a person may be indicted and convicted under that statute, § 3, for stealing a letter, though he has an employment in the post-office; *Rex v. Brown*, R. & R. C. C. 32. The secreting a letter, containing re-issuable country bank notes, which had been paid in London, but not re-issued, was declared an offence within the meaning of the Act mentioned in the text, by seven against four judges; *Rex v. Ranson*, R. & R. C. C. 232.

(25) Repealed by 7 & 8 Geo. IV. c. 27; and by 7 & 8 Geo. IV. c. 29, § 17; stealing goods or merchandise from any vessel, barge, or boat, in any port, river, or canal, or from any dock, wharf, or quay adjacent, is punishable with transportation for life, or not less than seven years, or imprisonment not exceeding four years, with whipping to male offenders in addition.

may be committed (*u*). And now, by statute 9 Geo. I. c. 22, to hunt, wound, kill, or steal any deer; to rob a warren; or to steal fish from a river or pond; being in these cases armed and disguised; also to hunt, wound, kill, or steal any deer, in the king's forests or chases enclosed, or in any other enclosed place where deer have been usually kept; or by gift or promise of reward to procure any person to join them in such unlawful act; all these are felonies without benefit of clergy (26). And the statute 16 Geo. III. c. 30, enacts, that every unauthorized person, his aiders and abettors, who shall course, hunt, shoot at, or otherwise attempt to kill, wound, or destroy any red or fallow deer in *any* forest, chase, purlieu, or ancient walk, or in any *enclosed* park, paddock, wood, or other ground, *where deer are usually kept, shall forfeit the sum of 20*l.*, or for every deer actually killed, wounded, destroyed, taken in any toil or snare, or carried away, the sum of 30*l.*, or double those sums in case the offender be a keeper: and, upon a second offence, whether of the same or a different species, shall be guilty of felony, and transportable for seven years. Which latter punishment is likewise inflicted on all persons armed with offensive weapons, who shall come into such places with an intent to commit any of the said offences, and shall there unlawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody. Also by statute 5 Geo. III. c. 14, the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, garden, orchard, or yard: and on the receivers, aiders, and abettors: and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of conies (*v*) by night in open warrens: and a forfeiture of five pounds, to the owner of the fishery, is made payable by persons taking or destroying, or *attempting* so to do, any fish in any river or other water within any enclosed ground, being private property (27). Stealing hawks, in disobedience to

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(*u*) 1 Hawk. P.C. 94; 1 Hal. P.C. 511.

(*v*) See stat. 22 & 23 Car. II. c. 25.

(26) Repealed by 7 & 8 Geo. IV. c. 27, vide note (2), *ante*, page 144, where the present punishments for these offences are fully set forth.

(27) These are also repealed. See note (2), *ante* 144, fully upon both these subjects.

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the rules prescribed by the statute 37 Edw. III. c. 19, is also felony (*w*) (28). It is also said (*x*) that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool (*y*), larceny may be committed; and also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed (*z*) (29). As to those *animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them (*a*), yet they are not of such estimation, as that the crime of stealing them amounts to larceny (*b*). But by statute 10 Geo. III. c. 18, very high pecuniary penalties, or a long imprisonment and whipping in their stead, may be inflicted by two justices of the peace, with a very extraordinary mode of appeal to the quarter sessions, on such as steal, or knowingly harbour a stolen *dog*, or have in their custody the skin of a dog that has been stolen (*c*) (30).

(*w*) 3 Inst. 98.

(*x*) Dalt. Just. c. 156.

(*y*) Dalt. 21; Crompt. 36; 1 Hawk. P. C. 93; 1 Hal. P. C. 507. The *King v. Martin*, by all the judges. P. 17 Geo. III.

(*z*) 1 Hal. P. C. 511.

(*a*) See vol. II. page 393.

(*b*) 1 Hal. P. C. 512.

(*c*) See the remarks in page 4. This statute hath now continued sixteen sessions of parliament unrepealed.

(28) Repealed by 7 & 8 Geo. IV. c. 27; see post, note (30).

(29) By statute 7 & 8 Geo. IV. c. 29, § 25, it was enacted, "That if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle, with intent to steal the carcass, or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as

a felon." But by a still more recent statute of 2 & 3 W. IV. c. 62, reciting the above-mentioned enactment, and also a similar one on the same subject, in 9 Geo. IV. c. 55, the punishment of death is removed from these offences, and that of transportation for life, without any power of mitigation, is substituted in its place.

(30) By statute 7 & 8 Geo. IV. c. 29, § 31, stealing any dog, beast, or bird ordinarily kept in a state of confinement, and not the subject of

Notwithstanding however that no larceny can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie, for the goods of a person unknown (*d*). In like manner as, among the Romans, the *lex Hostilia de furtis*, provided that a prosecution for theft might be carried on without the intervention of the owner (*e*). This is the case of stealing a shroud out of a grave; which is the property of those, whoever they were, that buried the deceased (31): but stealing the corpse itself, which has no owner, though a matter of great indecency, is no felony, unless some of the grave cloths be stolen with it (*f*) (32). Very different from the law of the Franks, which seems to have respected both as equal offences; when it directed that a person, who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants, till the relations of the deceased consented to his re-admission (*g*).

Having thus considered the general nature of simple larceny

(*d*) 1 Hal. P. C. 512.

(*e*) Gravin, l. 3, § 106.

(*f*) See vol. II. page 429.

(*g*) Montesq. Sp. L. b. 30, ch. 19.

larceny at common law, is punishable by fine not exceeding 20*l.*, together with the value of the dog, &c. lost, for the first offence, and imprisonment not exceeding twelve months, and whipping for the second offence. By § 32, persons being found in possession of any stolen dog, or beast, or the skin thereof, or any bird, or plumage thereof, shall restore the same to the owners by order of a justice; and persons having them in their possession knowing them to have been stolen, shall suffer the same punishment for each offence, as set forth in § 31. And § 33 makes the killing, wounding, or taking any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, punishable by fine, on conviction before a justice of the peace.

(31) See 3 Inst. 110; 12 Rep. 113; 1 Hale, 515. But it should seem that the property must be proved at the

trial to be in *somebody*, for else it shall be presumed to be in the prisoner upon his plea of Not Guilty; 2 Hale, 290; 8 Mod. 249.

(32) But the *taking up* a dead body, even though for the purpose of dissection, is an indictable offence at common law, and punishable by fine or imprisonment; *Rex v. Lynn*, 2 T. R. 733. So it has been held that to *sell* the dead body of a capital convict for dissection, where dissection is no part of his sentence, is a misdemeanor indictable at common law; *Rex v. Cundick*, D. & R. N. P. C. 13. And arresting a dead body whereby the burial is prevented, is a misdemeanor, punishable by fine and imprisonment; *Jones v. Ashburnham*, 4 East, 465; *Rex v. Lynn*, 2 T. R. 733. And obstructing a clergyman in the act of burying a corpse, is an indictable misdemeanor; *Rex v. Cheere*, 7 D. & R. 461; 4 B. & C. 902.

[*236*] I come next to treat of its *punishment*. Theft, by the *Jewish law, was only punished with a pecuniary fine, and satisfaction to the party injured (*h*). And in the civil law, till some very late constitutions, we never find the punishment capital. The laws of Draco at Athens punished it with death: but his laws were said to be written in blood: and Solon afterwards changed the penalty to a pecuniary mulct. And so the Attic laws in general continued (*i*); except that once, in a time of dearth, it was made capital to break into a garden, and steal figs; but this law, and the informers against the offence, grew so odious, that from them all malicious informers were styled sycophants; a name which we have much perverted from its original meaning. From these examples, as well as the reason of the thing, many learned and scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft (*j*). And certainly the natural punishment for injuries to property seems to be the loss of the offender's own property: which ought to be universally the case, were all men's fortunes equal. But as those who have no property themselves, are generally the most ready to attack the property of others, it has been found necessary, instead of a pecuniary, to substitute a corporal punishment; yet how far this corporal punishment ought to extend, is what has occasioned the doubt. Sir Thomas

(*h*) Exod. c. xxii.

(*i*) Petit. LL. Attic. l. 7, tit. 5.

(*j*) *Est enim ad vindicanda furtiva nimis utrox, nec tamen ad refrænanda sufficiens: quippe neque furtum simplex tum ingens facinus est, ut capite debeat plecti; neque ulla pœna est tanta, ut ab latrociniis cohibeat eos, qui nullam aliam artem quærendi victus habent.* (Mori Utopia, edit. Glasg. 1750, page 21.) *Denique, cum lex Mosaica, quanquam inclemens et aspera, tamen pecunia furtum, haud morte, mulctavit; ne putemus Deum, in nova lege clementiæ qua pater imperat filiis, majorem indulsisse nobis invicem sæviendi licentiam. Hæc sunt cur non licere putem: quam vero sit absurdum, atque etiam perniciosum rei-publicæ, furem atque homicidam ex æquo puniri, nemo est (opinor) qui nesciat.* (Ibid. 39.) "For it is too severe for

the punishment of theft, and, for the prevention of it, it is insufficient; simple theft is not an offence so atrocious as to merit the infliction of death, nor can any punishment, however severe, be sufficient to deter from its commission those who have no other means of support. Finally, since the mosaic law, although rigorous and unsparing, punished theft not with death, but with fines, let us not imagine that God, in a new law of mercy, by which a father governs his children, has afforded us a greater licence of severity towards each other. These are my reasons for thinking such a punishment unjust: how absurd, and how injurious to the state it must be, that a thief and a murderer should be visited with equal punishment, no man I think can be ignorant."

More (*j*), and the marquis Beccaria (*k*), at the distance of more than two centuries from each other, have very sensibly proposed that kind of corporal punishment which approaches the nearest to a pecuniary satisfaction, *viz.* a temporary imprisonment, with an obligation to labour, first for the party robbed, and afterwards for the public, in works of the most slavish kind; in *order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private property and public order. But notwithstanding all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital: and Puffendorf (*l*), together with Sir Matthew Hale (*m*), are of opinion that this must always be referred to the prudence of the legislature; who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions (*n*). Yet both these writers agree, that such punishment should be cautiously inflicted, and never without the utmost necessity.

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Our ancient Saxon laws nominally punished theft with death, if above the value of twelvepence: but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle (*o*). But, in the 9th year of Henry the first, this power of redemption was taken away, and all persons guilty of larceny above the value of twelvepence were directed to be hanged; which law continues in force to this day (*p*). For though the inferior species of theft, or petit larceny, is only punished by imprisonment or whipping at common law, (*q*), or, by statute 4 Geo. I. c. 11, may be extended to transportation for seven years, as is also expressly directed in the case of the Plate Glass Company (*r*), yet the punishment of grand larceny, or the stealing above the value of twelvepence, (which sum was the standard in the time of king Athelstan, eight hundred years ago,) is at common law regularly death (33). Which

(*j*) Utop, page 42.

(*k*) Ch. 22.

(*l*) L. of N. b. 8, c. 3.

(*m*) 1 Hal. P. C. 13.

(*n*) See page 9.

(*o*) Tac. de mor. Germ. c. 12.

(*p*) 1 Hal. P. C. 12. 3 Inst. 53.

(*q*) 3 Inst. 218.

(*r*) Stat. 13 Geo. III. c. 38.

(33) Vide ante, 229, note (1).

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considering the great intermediate alteration (*s*) in the price or denomination of *money, is undoubtedly a very rigorous constitution; and made Sir Henry Spelman (above a century since, when money was at twice its present rate) complain, that while every thing else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper (*t*). It is true, that the mercy of juries will often make them strain a point, and bring in larceny to be under the value of twelvepence, when it is really of much greater value: but this, though evidently justifiable and proper, when it only reduces the present nominal value of money to the ancient standard (*u*), is otherwise a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses the charge. It is likewise true that, by the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larceny to the value of thirteenpence or thirteen hundred pounds, though guilty of a capital offence, shall be excused the pains of death; but this is only for the first offence. And in many cases of simple larceny the benefit of clergy is taken away by statute: as from horsestealing in the principals and accessaries both *before* and *after* the fact (*w*): theft by great and notorious thieves in Northumberland and Cumberland (*x*); taking woollen cloth from off the tenters (*y*), or linens, fustians, calicoes, or cotton goods, from the place of manufacture (*z*) (35); (which extends, in the last

(*s*) In the reign of king Henry I. the stated value, at the exchequer, of a pasture fed ox, was one shilling; (Dial. de Scacc. l. 1, § 7,) which, if we should even suppose to mean the *solidus legalis* mentioned by Lyndewode, (Prov. l. 3, c. 13; see vol. II. page 509,) or the 72d part of a pound of gold, is only equal to 13s. 4d. of the present standard.

(*t*) Gloss. 350.

(*u*) 2 Inst. 189.

(*w*) Stat. 1 Edw. VI. c. 12; 2 & 3 Edw. VI. c. 33; 31 Eliz. c. 12.

(*x*) Stat. 18 Car. II. c. 3.

(*y*) Stat. 22 Car. II. c. 5. But as it sometimes is difficult to prove the identity of the goods so stolen, the

onus probandi with respect to innocence is now, by statute 15 Geo. II. c. 27, thrown on the persons in whose custody such goods are found: the failure whereof is, for the first time, a misdemeanor punishable by forfeiture of the treble value; for the second, by imprisonment also; and the third time it becomes a felony, punished with transportation for seven years.

(*z*) Stat. 18 Geo. II. c. 27. Note, in the three last cases an option is given to the judge to transport the offender; for *life* in the first case, for *seven years* in the second, and for *fourteen years* in the third: in the first and third cases *instead of* sentence of death, in the second *after* sentence is given,

(35) Clergy is restored by 4 Geo. IV. c. 59, which is now repealed by

case, to aiders, assisters, procurers, buyers, and receivers;) feloniously driving away, or otherwise stealing one or more sheep or other cattle specified in the *Acts (36), or killing them with intent to steal the whole or any part of the carcass (*a*), or aiding or assisting therein (37); thefts on navigable rivers above the value of forty shillings (*b*), or being present, aiding, and assisting thereat (38), plundering vessels in distress, or that have suffered shipwreck (*c*) (39); stealing letters sent by the post (*d*) (40); and also stealing deer, fish,

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(*a*) Stat. 14 Geo. II. c. 6; 15 Geo. II. c. 34. See vol. I. page 88.

(*b*) Stat. 24 Geo. II. c. 45.

(*c*) Stat. 12 Ann. st. 2, c. 18; 26 Geo. II. c. 19.

(*d*) Stat. 7 Geo. III. c. 50.

7 & 8 Geo. IV. c. 27. And by 7 & 8 Geo. IV. c. 28, § 6, it is enacted, "That benefit of clergy with respect to persons convicted of felony, shall be abolished, but that nothing herein contained, shall prevent the joinder, in any indictment, of any counts which might have been joined before the passing of this Act."

By statute 7 & 8 Geo. IV. c. 30, § 3, maliciously cutting or destroying any goods or article of silk, woollen, linen, or cotton, or of any such materials mixed, or of any framework-knitted piece, stocking, hose, or lace, being in any loom or frame, or on any machine or engine, rack, or tenter, or any machinery whatsoever belonging to those manufactures, or entering any manufactory, building, or place, with intent to commit such offences, is punishable with transportation for life, or not less than seven years, or imprisonment not exceeding four years, with whipping in addition to male offenders. The 4 Geo. IV. c. 46, is repealed by 7 & 8 Geo. IV. c. 27. The former statute repealed the capital felony prescribed by 22 Geo. III. on this subject.

By 7 & 8 Geo. IV. c. 29, § 16, stealing to the value of 10s. any silk, woollen, linen, or cotton, or any mixture of such materials, whilst exposed in any stage of manufacture, in any field, or building, or other place, is

punishable with transportation for life, or not exceeding fourteen years, or imprisonment not exceeding four years, with private or public whipping.

(36) Repealed by 7 & 8 Geo. IV. c. 27. See the next note.

(37) Vide note (29), *ante*, 236, where the existing punishments for these offences are set forth.

(38) Vide note (25), *ante*, 235, where the present punishment is described. Clergy was allowed by statute 4 Geo. IV. c. 54, which is now repealed by 7 & 8 Geo. IV. c. 27.

(39) By 7 & 8 Geo. IV. c. 29, § 18, any person plundering or stealing any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall suffer death as a felon; provided that where articles of small value shall be stranded or cast on shore, and stolen, without cruelty, outrage, or violence, the offender may be prosecuted and punished as for simple larceny: and in either case the offender may be tried in the county in which the offence is committed, or the next adjoining. The 12 Ann. st. 2, c. 18, & 26 Geo. II. c. 19, so far as they relate to the same subject, were repealed by the 7 & 8 Geo. IV. c. 27.

(40) Vide note (24), *ante*, 235.

hares, and conies, under the peculiar circumstances mentioned in the Waltham black act (e) (41). Which additional severity is owing to the great malice and mischief of the theft in some of these instances ; and, in others, to the difficulties men would otherwise lie under to preserve those goods, which are so easily carried off. Upon which last principle the Roman law punished more severely than other thieves the *abigei*, or stealers of cattle (f) ; and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths (g) ; both which constitutions seems to be borrowed from the laws of Athens (h). And so too the ancient Goths punished with unrelenting severity thefts of cattle, or corn that was reaped and left in the field : such kind of property, which no human industry can sufficiently guard, being esteemed under the peculiar custody of heaven (i). And thus much for the offence of *simple larceny*.

Compound larceny, is

Mixed, or *compound larceny*, is such as has all the properties of the former, but is accompanied with either one, or both, of the aggravations of a taking from one's *house* or *person*. First, therefore, of larceny from the *house*, and then of larceny from the *person*.

1. Larceny from the house, made an aggravated offence by recent statutes, but varying according to the value of the property stolen ;

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I. Larceny from the *house*, though it seems, from the considerations mentioned in the preceding chapter (j), to have a higher degree of guilt than simple larceny, yet it is not at all *distinguished from the other at common law (k) ; unless where it is accompanied with the circumstance of breaking the house by night ; and then we have seen that it falls under another description, *viz.* that of burglary. But now by several Acts of Parliament (the history of which is very ingeniously deduced by a modern learned writer (l), who hath shewn them to have gradually arisen from our improvements in trade and opulence) the benefit of clergy is taken from larcenies committed in a house in almost every instance ; except that larceny of the stock or utensils of the Plate Glass Company from any of their houses, &c. is made only single felony, and liable

(e) Stat. 9 Geo. I. c. 22.

(f) Ff. 47, t. 14.

(g) Ibid. t. 17.

(h) Pott. Antiq. b. 1, c. 26.

(i) Stiernh. de jur. Goth. 1. 3, c. 5.

(j) See page 223.

(k) 1 Hawk. P. C. 98.

(l) Barr. 375, &c.

(41) Vide note (2), ante, 144, by which it will appear that the capital felony is removed.

to transportation for seven years (*m*). The multiplicity of the general acts is apt to create some confusion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domestic aggravations of larceny; *viz.* First, in larcenies *above the value of twelvecence*, committed, I. In a church or chapel, with or without violence, or breaking the same (*n*) (42): 2. In a booth or tent in a market or fair, in the day time or in the night, by violence or breaking the same; the owner or some of his family being therein (*o*) (43): 3. By robbing a dwelling-house in the day time (which *robbing* implies a breaking) any person being therein (*p*): 4. In a dwelling-house by day or by night, without breaking the same, any person being therein and put in fear (*q*): which amounts in law to a robbery: and in both these last cases the accessory before the fact is also excluded from his clergy. Secondly, in larcenies *to the value of five*

(*m*) Stat. 13 Geo. III. c. 38.*

(*o*) Stat. 5 & 6 Edw. VI. c. 9

(*n*) Stat. 23 Hen. VIII. c. 1;

1 Hal. P. C. 522.

1 Edw. VI. c. 12; 1 Hal. P. C. 518.

(*p*) Stat. 3 & 4 W. & M. c. 9.

(*q*) Ibid.

(42) By 7 & 8 Geo. IV. c. 29, § 10, "if any person shall break and enter any church or chapel, and steal therein any chattel, or, having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon."

By a prior statute of 7 & 8 Geo. IV. c. 27, the ancient statutes of 23 Hen. VIII. c. 1, & 1 Edw. 6, c. 12, relating to the offence of sacrilege, were repealed.

The provisions of 1 Edw. 6, c. 12, were held not to be confined to goods used for Divine Service, but to extend to articles kept in a church for the purposes of repair; *Rex v. Rourke*, R. & R. C. C. 386. That decision would seem equally applicable to the present statute.

If a church tower is built higher than the church, and has a separate

roof, but no outer door, and is accessible only from the body of the church, from which it is not separated by any partition; the tower is a part of the church within the statute 7 & 8 Geo. IV. c. 29, § 10; *Rex v. Wheeler*, 3 C. & P. 585. And see *Rex v. Blick*, 4 C. & P. 377.

Goods in a dissenting chapel vested in trustees cannot be described as the goods of their servant, who has merely the custody of the chapel and things in it, to clean and keep in order, though he has the key, and no other person but the minister has another key; *Rex v. Hutchinson*, R. & R. C. C. 412.

A dissenting meeting-house is not a "chapel" within the meaning of the present statute; *Rex v. Richardson*, 6 C. & P. 335.

(43) The statute 5 & 6 Edw. 6, c. 9, constituting this offence is repealed by 7 & 8 Geo. IV. c. 27.

* Vide ante, 228, notes (*p*) (13).

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shillings, committed, 1. By breaking any dwelling-house, or any out-house, shop, or warehouse, thereunto belonging, in the day time, although no person be therein (*r*); which also now extends to aiders, abettors, and accessaries before the fact (*s*): 2. By privately stealing goods, *wares, or merchandise, in any shop, warehouse, (*t*), coach-house, or stable, by day or by night; though the same be not broken open, and though no person be therein (*u*) which likewise extends to such as assist, hire, or command the offence to be committed. Lastly, in larcenies, *to the value of forty shillings* in a dwelling-house, or its outhouses, although the same be not broken, and whether any person be therein or no; unless committed against their masters by apprentices under the age of fifteen (*v*). This also extends to those who aid or assist in the commission of any such offence (44).

2. Larceny from the person, by privately stealing, or by robbery;

2. Larceny from the *person* is either by *privately* stealing; or by open and violent assault, which is usually called *robbery*.

The offence of *privately* stealing from a man's *person*, as by picking his pocket or the like, privily without his knowledge, was debarred of the benefit of clergy, so early as by the statute 8 Eliz. c. 4 (45). But then it must be such a larceny, as stands in need of the benefit of clergy, viz. of above the value of tweldepence; else the offender shall not have judgment of death. For the statute creates no new offence; but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the ancient

(*r*) Stat. 69 Eliz. c. 15.

(*u*) Stat. 10 & 11 W. III. c. 23.

(*s*) Stat. 3 & 4 W. & M. c. 9.

(*v*) Stat. 12 Ann. stat. 1, c. 7.*

(*t*) See Foster, 78; Barr. 379.

(44) The existing law relative to the various offences mentioned in the text under the title "Larceny from the house," will be found stated *ante* 223, note (5).

(45) Repealed by 7 & 8 Geo. IV. c. 27, and see 7 & 8 Geo. IV. c. 28, § 6 & 7; the former enacting that benefit of clergy, with respect to per-

sons convicted of felony, shall be abolished; and the latter, that no person convicted of felony shall suffer death, unless for some felony excluded from benefit of clergy before or on the first day of the then present session of parliament, or made punishable with death by some statute passed after that day.

* Repealed by stat. 7 & 8 Geo. IV. c. 27. The sum mentioned in the text is now raised to five pounds, *vide ante*, note 42.

law (*w*). This severity, for a most severe law it certainly is, seems to be owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised (even in the queen's court and presence) at the time when this statute was made: besides that this is an infringement of property, in the manual occupation or corporal possession of the *owner, which was an offence even in a state of nature. And therefore the *saccularii*, or cutpurses, were more severely punished than common thieves by the Roman and Athenian laws (*x*).

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Open or violent larceny from the *person*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear (*y*) (46). 1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony, so late as Henry the fourth's time (*z*); but afterwards it was taken to be only a misdemes-

to constitute the second, there must be a taking of property, and with force, but the value is immaterial.

(*w*) 1 Hawk. P. C. 98. The like observation will certainly hold in the cases of horse-stealing, (1 Hal. P. C. 531;) thefts in Northumberland and Cumberland; and stealing woollen cloth from the tenters; and possibly in such other cases where it is provided by any statute that simple larceny, un-

der certain circumstances, shall be felony without benefit of clergy. And see post 242, n. (46.)

(*x*) Ff. 47, 11, 7, Pott. Antiq. l. 1, c. 26.

(*y*) 1 Hawk. P. C. 95.

(*z*) 1 Hal. P. C. 532.

(46) By 7 & 8 Geo. IV. c. 29, § 6, if any person shall *rob* any other person of any chattel, money, or valuable security, every such offender, being convicted thereof, shall suffer death as a felon; and, if any person shall *steal any such property from the person* of another, or shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property of any other person, with intent to steal the same, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to transportation for life, or not less than seven years, or to be imprisoned not exceeding four years; with, if a male, public or private whippings. This statute is nearly a consolidation of 3 W. & M. c. 9, § 1, respecting rob-

bery; of 48 Geo. III. c. 129, respecting stealing from the person; and of 4 Geo. IV. c. 54, respecting assaults, &c. with intent to rob. The 23 Hen. VIII. c. 1; 3 W. & M. c. 9; and 1 E. VI. c. 12, relating to robbery; the 48 Geo. III. c. 129, relating to stealing from the person; and the 4 Geo. IV. c. 54, relating to assaults with intent to rob, are repealed by the 7 & 8 Geo. IV. c. 27. The *value* of the property is immaterial, in all the cases mentioned in the new Act.

To constitute a stealing from the person, the thing must be completely removed from the person; removal from the place where it was, if it remain throughout with the person, is not sufficient; *Rex. v. Thompson*, 1 R. & M. C. C. 78.

nor, and punishable with fine and imprisonment; till the statute 7 Geo. II. c. 21, which makes it a felony (transportable for seven years) unlawfully and maliciously to assault another, with any offensive weapon or instrument; or by menaces, or by other forcible or violent manner, to demand any money or goods; with a felonious intent to rob (47). If the thief, having once taken a purse, returns it, still it is a robbery: and so it is, whether the taking be strictly from the person of another, or in his presence only: as, where a robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face (*a*). But if the taking be not either directly from his person, or in his presence, it is no robbery (*b*). 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery (*c*). 3. Lastly, the taking must be by force, or a previous putting in fear; which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law (*d*), "*qui vi rapuit, fur improbius esse videtur.*" This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one *privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent (*e*): neither is it capital, as privately stealing, being under the value of twelvepence. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear*; it is sufficient, if laid to be done by *violence* (*f*). And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much

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(*a*) 1 Hal. P. C. 533.

(*b*) Comyns, 478; Stra. 1015.

(*c*) 1 Hawk. P. C. 97.

(*d*) Ff. 4, 2, 14, § 12.

(*e*) 1 Hal. P. C. 534.

(*f*) Trin. 3 Ann. by all the judges.

(47) By 7 & 8 Geo. IV. c. 29, § 7, if any person shall accuse or threaten to accuse any other person of any infamous crime, as described in § 9, with a view or intent to extort or gain from him, and shall by intimidating him by such accusation or threat, extort or gain from him any chattel, money, or valuable security, every such offender shall

be deemed guilty of robbery, and shall be indicted and punished accordingly.

It is equally a robbery to extort money from a person by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not; *Rex v. Gardner*, 1 C. & P. 79.

force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent (*g*) (48). Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear*, yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious robbery (*h*). So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted (*i*), whether the forcing a higler, or other chapman to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery (49).

This species of larceny is debarred of the benefit of clergy by statute 23 Hen. VIII. c. 1, and other subsequent statutes; not indeed in general, but only when committed in a dwelling-

(*g*) Fost. 128.

(*i*). Ibid. 97.

(*h*) 1 Hawk. P. C. 96.

(48) Snatching an article from a man will constitute a robbery, if it be so attached to his person or clothes as to afford resistance; *Rex v. Mason*, R. & R. C. C. 419. The true definition of robbery is the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of *force* or *terror*, as to induce the party *unwillingly* to part with his property; and whether the terror arises from real or expected violence to the person, or from a sense of injury to the character, the law makes no kind of difference; for to most men the idea of losing their fame and reputation is equally, if not more terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the judges are unanimously of opinion, that upon the principles of law, and the authority of former decisions, a *threat* to accuse a man of having committed the greatest of all crimes, is a sufficient force to constitute

the crime of robbery by putting in fear; per Ashurst, J., in *Rex v. Willan*, Leach, 232. Where thieves meet a person, and, by menaces of death, make him swear to bring them money, and he, under the influence of such threats, complies, it amounts to robbery. 1 East, P. C. 714.

(49) This distinction has been frequently admitted by the judges in prosecutions for robbery, *viz.* that if any thing is snatched suddenly from the head, hand, or person of any one without any struggle on the part of the owner, or without any evidence of force or violence being exerted by the thief, it does not amount to robbery. But if any thing is broken or torn in consequence of the sudden seizure, it would be evidence of such force as would constitute a robbery; as where part of a lady's hair was torn away by snatching a diamond pin from her head, and an ear was torn by pulling off an ear-ring, each of these cases was determined to be a robbery; Leach, 238.—CH.

house, or in or near the king's highway. A robbery therefore in a distant field, or footpath, was not punished with death (*k*); but was open to the benefit of clergy, till the statute 3 and 4 W. and M. c. 9, which takes away clergy from both principals and accessaries before the fact, in robbery, wheresoever committed. (50).

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II. Malicious mischief, which is committed not *animo furandi*, but from cruelty or revenge;

II. Malicious *mischief*, or damage, is the next species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; which is some, though a weak, excuse: but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property, of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree. Of these I shall extract the contents in order of time.

And, first, by statute 22 Hen. VIII. c. 11, perversely and maliciously to cut down or destroy the powdike, in the fens of Norfolk and Ely, is felony. And in like manner it is by many special statutes, enacted upon the occasions, made felony to destroy the several sea-banks, river-banks, public navigations, and bridges, erected by virtue of those Acts of Parliament (51). By statute 43 Eliz. c. 13, for preventing rapine on the northern borders, to burn any barn or stack of corn or grain; or to imprison or carry away any subject, in order to ransom him, or to make prey or spoil of his person or goods upon deadly feud or otherwise, in the four northern counties of Northumberland, Westmorland, Cumberland, and Durham, or being accessory before the fact to such carrying away or imprisonment: or to give or take any or contribution, there called *blackmail*, to secure such goods from rapine; is felony without benefit of clergy. By statute 22 and 23 Car. II. c. 7, maliciously, unlawfully, and willingly, in the night time, to burn or cause to be burnt or destroyed, any

(*k*) 1 Hal. P. C. 535.

(50) These statutes are repealed by 7 & 8 G. IV. c. 27. Vide ante, 242, note (46).

(51) Vide ante, 145, note (3), where it will be seen that these offences are provided for under Mr. Peel's Acts.

ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns (52); or to kill any horses, sheep, or other cattle, is felony; but the offender may make his election to be transported for seven years (53); and to maim or hurt such *horses, sheep, or other cattle, is a trespass, for which treble damages shall be recovered (54). By statute 4 and 5 W. and M. c. 23, to burn on any waste, between Candlemas and Midsummer, any grig, ling, heath, furze, gorse, or fern, is punishable with whipping and confinement in the House of Correction (55). By statute 1 Ann. st. 2, c. 9, captains and mariners belonging to ships, and destroying the same, to the prejudice of the owners, and, by 4 Geo. I. c. 12, to the prejudice of insurers also, are guilty of felony without benefit of clergy. And, by statute 12 Ann. st. 2, c. 18, making any hole in a ship in distress, or stealing her pumps, or aiding or abetting such offence, or wilfully doing any thing tending to the immediate loss of such ship, is felony without benefit of clergy (56). By statute 1 Geo. I. c. 48, maliciously

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(52) By statute 7 & 8 Geo. IV. c. 30, § 17, maliciously setting fire to any stack of corn, grain, pulse, straw, hay, or wood, is a capital felony; and setting fire to any crops of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever growing, is a felony, punishable with transportation not exceeding seven years, or imprisonment not exceeding two years, with private or public whipping for male offenders. The 43 Eliz. c. 13; 4 & 5 W. & M. c. 23; 22 & 23 Car. II. c. 7; 1 Geo. I. st. 2, c. 48; 6 Geo. I. c. 16; 9 Geo. I. c. 22; and 28 Geo. II. c. 19, § 3, are repealed by 7 & 8 Geo. IV. c. 27.

(53) *Vide ante*, 236, note (29). This offence no longer amounts to a capital felony, but it is punished by transportation for life.

(54) By statute 7 & 8 Geo. IV. c. 30, § 16, maliciously killing, maiming, or wounding any cattle, is a felony punishable with transportation for life, or not less than seven years, or imprisonment not exceeding four years, with

private or public whipping. The 22 & 23 Car. II. c. 7; 14 Geo. II. c. 6; and 15 Geo. II. c. 34, on this head, are repealed by 7 & 8 Geo. IV. c. 27. By § 25, it is provided, that malice against the owner of the property destroyed, shall not be essential to any offence under the Act.

(55) *Vide ante* 244, note (52).

(56) By 7 & 8 Geo. IV. c. 30, § 9, maliciously setting fire to, or in anywise destroying, any ship or vessel, whether in a finished or unfinished state, is a capital felony. And by § 10, malicious damaging any ship otherwise than by fire, is a felony, punishable with transportation for seven years, or imprisonment not exceeding two years, with private or public whipping. And by § 11, exhibiting false lights or signals to bring any ship or vessel into danger, or tending to its immediate destruction, or destroying the same in distress, or when cast on shore, or any of its contents, or preventing any assistance to those on board, is made a capital felony. And by 1 & 2 Geo. IV. c. 75, § 11, injuring or concealing any buoys, ropes, or marks, belonging to

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to set on fire any underwood, wood, or coppice, is made single felony (57). By statute 6 Geo. I. c. 23, the wilful and malicious tearing, cutting, spoiling, burning, or defacing of the garments or clothes of any person passing in the streets or highways, with intent so to do, is felony. This was occasioned by the insolence of certain weavers and others: who, upon the introduction of some Indian fashions prejudicial to their own manufactures, made it their practice to deface them; either by open outrage, or by privily cutting, or casting *aqua fortis* in the streets upon such as wore them (58). By statute 9 Geo. I. c. 22 (59), commonly called the Waltham black act, occasioned by the devastations committed near Waltham in Hampshire, by persons in disguise or with their faces blacked; who seem to have resembled the Roberdsmen, or followers of Robert Hood, that in the reign of Richard the first committed great outrages on the borders of England and Scotland (*l*); by this Black Act, I say, which has in part been mentioned under the several heads of riots, menaces, mayhem, and larceny (*m*), it is further enacted, that to set fire to any house, barn, or outhouse, which is extended by statute 9 Geo. III. c. 29, to the *malicious and wilful burning or setting fire to all kinds of mills (60), or to any hovel, cock, mow, or stack of corn, straw, hay, or wood (61); or unlawfully and maliciously to break down the head of any fishpond, whereby the fish shall be lost or destroyed (62); or in like manner to kill, maim, or wound any cattle (63); or cut down or destroy, any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit (64); all these malicious acts, or procuring by gift or promise of reward any person to join them therein, are felo-

(*l*) 3 Inst. 197.(*m*) See pp. 144, 208, 235, 240.

any anchor or cable attached to any ship or vessel whatever, whether in distress or otherwise, is punishable with transportation for any term not exceeding seven years, or imprisonment for any number of years at the discretion of the court.

(57) *Vide ante*, 244, note (52).

(58) This statute was repealed by 7 Geo. IV. c. 64, and no subsequent

enactment on the subject has been made.

(59) Repealed by 7 & 8 Geo. IV. c. 27.

(60) *Vide ante*, 221, note (2).(61) *Vide ante*, 244, note (52).(62) *Vide ante*, 144, note (2).(63) *Vide ante*, 245, note (54).(64) *Vide ante*, 233, in notis.

nies without benefit of clergy: and the hundred shall be chargeable for the damages, unless the offender be convicted (65). In like manner by the Roman law, to cut down trees,

(65) By statute 7 & 8 Geo. IV. c. 30, § 15, maliciously breaking down, or destroying the dam of any fishpond, or of any water being private property, or in which there is any private right of fishery, with intent to destroy the fish therein, or putting any lime or other noxious ingredient therein, with intent to destroy the fish, or breaking down the dam of any mill pond, is declared to be a misdemeanor, punishable at the discretion of the court, with transportation for seven years, or imprisonment not exceeding two years, with private or public whipping for male offenders. 5 Eliz. c. 21, and 4 Geo. IV. c. 54, are repealed, as they relate to this subject, by 7 & 8 Geo. IV. c. 27, as also the 9 Geo. III. c. 29.

By statute 7 & 8 Geo. IV. c. 31, § 2, it is enacted, "That if any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture or in any branch thereof, or any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection, used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, shall be feloniously demolished, pulled down, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together, in every such case the inhabitants of the hundred, wapentake, ward, or other dis-

trict in the nature of a hundred, by whatever name it shall be denominated, in which any of the said offences shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any of the subjects hereinbefore enumerated, but also for any damage which may at the same time be done by any such offenders to any fixture, furniture, or goods whatever, in any such church, chapel, house, or other of the buildings or erections aforesaid."

It has been held, in an action against the hundred, upon the repealed statute 9 Geo. I. c. 22, that a *Reversioner* may sue for the injury he has sustained; that, if no servant of his had the care of the premises, *he* is the proper person to give in the examination: that he is not bound in such examination to state his suspicions as to the offender; and, that the two days allowed by the statute for giving notice of the offence, are exclusive of the day on which the fire happens; *Pellew v. Wonford*, 9 B. & C. 134; 4 M. & R. 130. It has also been held, that an action on that statute does not lie against two of the inhabitants of the hundred by name, but must be brought against the inhabitants at large; *Jackson v. Pearson*, 2 D. & R., 439; 1 B. & C. 304. The action lies against the hundred by the owner, though he has received the amount of his loss from an Insurance Office; *Clark v. Blything*, 3 D. & R., 489; 2 B. & C. 254.

By sect. 3, persons damnified by the offence, or the servant in whose charge the injured property was intrusted, must within seven days after the offence has been committed go before a justice of the peace residing within the hundred, and state on oath the name of the offender if known, and

and especially vines, was punished in the same degree as robbery (*n*). By statutes 6 G. II. c. 37, and 10 G. II. c. 32, it

(*n*) Ff. 47, 7, 2.

submit to an examination touching the offence, and become bound to prosecute the offenders when taken. The action must be commenced within three calendar months after the offence.

By sect. 4, all process in the action must be served on the high constable, who within seven days must give notice thereof to two magistrates of the division, and who may defend or let judgment go by default, as advised.

By sect. 5, any inhabitant of the hundred may be a competent witness.

By sect. 6, if the plaintiff recovers, the writ of execution is not to be enforced, but the sheriff on receipt of it is to make his warrant to the county treasurer, who is directed to pay the amount.

Sect. 7, directs that the high constable's expences are to be allowed by two justices, and paid by the county treasurer: the whole of such monies are to be levied on the hundred over and above their share of the county rate.

By sect. 8, where the injury does not exceed 30*l.*, the parties are to give notice to the high constable of their claim for compensation, who is to exhibit the same to two magistrates in the division, and they are to appoint a special petty session between twenty and thirty days afterwards to determine the claim: the high constable is required to give notice in writing to the claimants, of the day, hour, and place of holding such petty session within three days after its appointment, and to give ten days' notice to all magistrates residing in the district; and the claimants must cause a notice, according to the schedule annexed to the Act, to be fixed to the church or chapel door, or other conspicuous part of the neighbourhood, two Sundays preceding the petty sessions.

Sect. 9, authorizes justices in petty sessions to hear such cases (as mentioned in sect. 8), and award compensation.

Sect. 10, imposes a penalty on high constables for neglect of duty.

Sect. 11, directs, that proceedings, in case of damage to any church or chapel, shall be taken in the name of the resident rector, vicar, or curate; and if none such, then in the name of the church or chapel wardens, or such persons as the property in the chapel may be vested in, and in case of damage to property belonging to a corporation, such body are entitled to recover compensation. The like conditions are to be observed as set forth in the prior sections.

Sect. 12, gives a similar remedy against any county of a city, or liberty, city, town, or place, not within a hundred, and not contributing to a county rate, where the damage shall occur therein.

Sect. 13, gives an authority to sheriffs to direct their warrants into liberties.

Sect. 14, directs, that reimbursements in cities, liberties, and towns, not within any hundred, but contributing to the county rate, shall be made by the treasurer of the county on the sheriff's warrant.

Sect. 15, directs, that in counties of cities, and in liberties, cities, and towns, not contributing to any county rate, reimbursement shall be made out of the rate applicable to the same purposes as a county rate, if any such, and if none such, then out of the fund for the relief of the poor, by the overseers of the parish in which the damage was sustained.

By statute 7 & 8 Geo. IV. c. 27, all prior Acts relating to actions against

is also made felony without the benefit of clergy, maliciously to cut down any river or sea bank, whereby lands may be overflowed or damaged; or to cut any hop-binds growing in a plantation of hops (66), or wilfully and maliciously to set on fire, or cause to be set on fire, any mine, pit, or delphth of coal (67). By statute 11 Geo. II. c. 22, to use any violence in order to deter any person from buying corn or grain: to seize any carriage or horse carrying grain or meal to or from any market or seaport; or to use any outrage with such intent: or to scatter, take away, spoil, or damage such grain or meal; is punished for the first offence with imprisonment and public whipping: and the second offence, or destroying any granary where corn is kept for exportation, or taking away or spoiling any grain or meal in such granary, or in any ship, boat, or vessel intended for exportation, is felony, subject to transportation for seven years (68). By statute 28 Geo. II. c. 19, to set fire to any gorse, furze, or fern growing in any forest or chase, is subject to a fine of five pounds (69). By statutes 6 Geo. III. c. 36 and 48, and 13 Geo. III. c. 33, wilfully to spoil or destroy any timber or other trees, roots, *shrubs, or plants, is for the two first offences liable to pecuniary penalties; and for the third, if in the day time, and even for the first if at night, the offender shall be guilty of felony, and liable to transportation for

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the hundred are repealed; and the hundred is now no longer liable in cases of robbery, but only in cases where the damage is done by a riotous assembly.

An isolated and unfinished building, constructed as, and intended for, a dwelling-house, but never inhabited, and which had been used as a barn, has been held, in an action against the hundred under the repealed statute 9 Geo. I. c. 22, to be neither a house, outhouse, or barn, within the meaning of sect. 7; *Elsmore v. St. Briavells*, 8 B. & C. 461; 2 M. & R. 433.

(66) Benefit of clergy was restored by 4 Geo. IV. c. 46, and transportation and imprisonment were substituted. This Act is now repealed by 7 & 8 Geo. IV. c. 27, as also the Acts men-

tioned in the text, vide *ante*, 144, note (2).

(67) By statute 7 & 8 Geo. IV. c. 30, § 18, maliciously destroying any hop binds growing on poles in plantations of hops, is a felony liable to transportation for life, or not less than seven years, or imprisonment not exceeding four years, with private or public whipping. And by sect. 5, setting fire to any coal-mine is a capital felony.

(68) The latter part of this Act, relating to the damages to which the hundred is liable, is repealed by 7 & 8 Geo. IV. c. 27; and see as to the offences mentioned in the text, 9 Geo. IV. c. 31, § 26, *ante*, 158, note (14), 217, note (19).

(69) Repealed; vide *ante*, 245, note, (52)

seven years (70). By statute 9 Geo. III. c. 29, wilfully or maliciously to burn or destroy any engine or other machines, therein specified, belonging to any mine (71); or any fences for enclosures pursuant to any Act of Parliament, is made single felony, and punishable with transportation for seven years, in the offender, his advisers and procurers (72). And by statute 13 Geo. III. c. 38, the like punishment is inflicted on such as break into any house, &c. belonging to the Plate Glass Company with intent to steal, cut, or destroy any of their stock or utensils, or shall wilfully or maliciously cut or destroy the same. And these are the principal punishments of malicious mischief (73).

III. Forgery
which is the
false making or
alteration of a
written instru-
ment with in-
tent to defraud;

III. Forgery, or the *crimen falsi*, is an offence, which was punished by the civil law with deportation or banishment, and sometimes with death (o). It may with us be defined, at common law, to be, "the fraudulent making or alteration of a writing to the prejudice of another man's

(o) Inst. 4, 18, 7.

(70) Vide *ante*, 233, note (15), where the existing punishments are set forth. The statutes mentioned in the text are repealed.

(71) By statute 7 & 8 Geo. IV. c. 27, the above is repealed. And by 7 & 8 Geo. IV. c. 30, § 6, maliciously causing any water to be conveyed into any mine with intent to damage it, or obstructing any air way, water way, drain, pit, level, or shaft belonging thereto, is punishable as a felony, with transportation for seven years, or imprisonment not exceeding two years, with private or public whipping. By sect. 7, maliciously destroying or damaging with such intent, any engine or other machines belonging to any mine, or any erections attached thereto, or any bridge, waggon-way, or trunk, connected with the same, is a felony liable to the same punishment as in the last recited clause.

(72) By statute 7 & 8 Geo. IV. c. 30, § 23, maliciously destroying any description of fence whatsoever, or any wall, stile, or gate, is punishable for the first offence with fine not exceeding

5*l.* above the value of the injury done, and with imprisonment not exceeding twelve months, with hard labour and private or public whipping for any subsequent offence.

By 7 & 8 Geo. IV. c. 29, § 40, stealing, or destroying with intent to steal, any live or dead fence, wooden fence, stile, or gate, is subject to a penalty not exceeding 5*l.* above the value of the loss or injury sustained for the first offence, and to hard labour and imprisonment not exceeding twelve months, with whipping for subsequent offences.

And by the same statute, § 41, suspected persons found with any tree or shrub, underwood, live or dead fence, post, pale, rail, stile, or gate, of the value of two shillings, and not satisfactorily accounting for it, are liable to a penalty of 2*l.* above the value of the article found.

(73) The following statutes on this head are repealed by 7 & 8 Geo. IV. c. 27; viz., 13 Edw. I. st. 1, c. 46; 6 Geo. I. c. 16; 9 Geo. III. c. 29; & 16 Geo. III. c. 30.

right (74):" for which the offender may suffer fine, imprisonment, and pillory. And also, by a variety of statutes, a more

(74) Or in other words it may be described, "as the false making of an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons;" *Rea v. Jones*, 2 East, P. C. 991. The punishment of pillory is taken away by 56 Geo. III. c. 138. It does not appear necessary to prove that the whole instrument is fictitious in order to establish a false making, as the giving a fictitious name to an otherwise proper security, to render it more available, is forgery. Thus the indorsing a bill in a fictitious name is a forgery, though the bill would have been equally negotiable if indorsed by the prisoner in his own name, if the assumed name was used in order to defraud; *Rex v. Marshall*, R. & R. C. C. 75. It is immaterial whether any additional credit be gained by the forgery, or whether the false name be assumed by the party himself for the occasion; *Id.* The altering a real signature to a false one, or fraudulently erasing, inserting, or altering any material part in a true document, or changing the date in a bill of exchange after it has been properly accepted, are forgeries; 1 Hale, 684, 5. So the forging the name of a person, although such person never existed, is a felony; *Rex v. Bolland*, 1 Leach, C. C. 83. So if a person authorize another to sign a note in his name, dated at a particular place, and made payable at a banker's; and the person in whose name it is drawn represent it to be the name of another person, with intent to defraud, and no such person as the note and the representation import exists, this is forgery, for it is a false making of an instrument, in the name of a non-existing person; *Rex v. Parkes*, 2 Leach, C. C. 775; 2 East, P. C. 963, 992. Altering a bill of exchange

from a lower to a higher sum is a forging it, and the party doing it may be indicted under the 7 Geo. II. c. 22, for the forgery; and it was declared in the same case to be no defence to prove, that prior to the alteration the bill had been paid by the drawer and re-issued; *Rex v. Teague*, R. & R. C. C. 33.

It is a necessary and indispensable ingredient in the crime of forgery, to shew that the parties committed the offence with an intent to defraud; a point to be determined by the jury. In *Rex v. Mazagora*, R. & R. C. C. 291, it was held, that a jury ought to infer an intent to defraud the person who would have to pay a forged instrument if it were genuine, although from the mode of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was generally to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation. Uttering a forged order for the payment of money under a false representation, is evidence of knowing it to be forged; *Rex v. Sheppard*, 1 Leach, C. C. 226, R. & R. C. C. 169. So uttering a forged stock receipt to a person who employed the prisoner to buy stock to that amount, and advanced the money, is sufficient evidence of an intent to defraud that person; and the oath of the person to whom the receipt was uttered, that he believed the prisoner had no such intent, will not repel the presumption of an intention to defraud; *Id.* Where on an indictment for forging a bill of exchange, it appears that the prisoner assumed a false name on such bill, and there is proof of his real name, it is for him to prove that

severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general. I shall mention the principal instances.

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By statute 5 Eliz. c. 14, to forge or make, or knowingly to publish or give in evidence, any forged deed, court roll, or will, with intent to affect the right of real property, either freehold or copyhold, is punished by forfeiture to the party grieved of double costs and damages; by standing in the pillory, and having both his ears cut off, and his nostrils slit, and seared; by forfeiture to the crown of the profits of his lands, and by perpetual imprisonment. For any forgery *relating to a term of years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of any personal chattels, the same forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and a year's imprisonment: the second offence in both cases being felony without benefit of clergy.

and is, by the
existing law,
almost univer-
sally capital.

Besides this general Act, a multitude of others, since the revolution, when paper credit was first established, have inflicted capital punishment on the forging, altering, or uttering as true, when forged, of any bank bills or notes, or other securities (*p*) (75); of bills of credit issued from the

(*p*) Stat. 8 & 9 W. III. c. 20, § 36; 15 Geo. II. c. 13; 13 Geo. III. c. 79.
11 Geo. I. c. 9; 12 Geo. I. c. 32;

he used the assumed name before the time he had the fraud in view, even in the absence of all proof as to what name he had used for several years before the fraud in question; *Rex v. Peacock*, R. & R. C. C. 278. To support a charge of forgery by subscribing a fictitious name, there must be satisfactory evidence on the part of the prosecutor that it was not the party's real name, and that it was assumed for the purpose of fraud in that instance; *Rex v. Bontien*, id. 260. It is not requisite to shew an intent to defraud a particular person, a general intent will be sufficient; 3 T. R. 176; 1 Leach, 216. So, where a prisoner was tried for forging a note, and it appeared that he had kept the note in his possession, and never attempted to

utter it; it was held, that the question whether the note was made innocently, or with intent to defraud, was one proper for the consideration of the jury, and was to be collected from the facts proved; *Rex v. Crocker*, R. & R. C. C. 97; 2 Leach, C. C. 987.

(75) The bank having preferred one indictment for uttering a forged note, and another for having the same in possession, and having elected to proceed on the latter charge, it was held, that although facts sufficient to support the capital charge were made out in proof, an acquittal for the minor offence ought not to be directed, because the whole of the minor charge was proved, and that did not merge in the larger. R. & R. C. C. 378. On an indictment for forging a bank note, the

exchequer (*q*) (76); of South Sea bonds, &c. (*r*); of lottery tickets or orders (*s*) (77); of army or navy debentures (*t*); of

(*q*) See the several Acts for issuing them.

(*r*) Stat. 9 Ann. c. 21; 6 Geo. I. c. 4 & 11; 12 Geo. I. c. 32.

(*s*) See the several Acts for the lotteries.

(*t*) Stat. 5 Geo. I. c. 14; 9 Geo. I. c. 5.

cashier who signed "for the governor and company of the Bank of England," is a *competent* witness to prove the forgery; for he is not by such a signature personally responsible for the payment of the note; 1 Leach, C. C. 311; R. & R. C. C. 378; but he is not an *essential* witness, as his handwriting may be disproved by other witnesses; *Rex v. Hughes*, and *Rex v. M'Guire*, 2 East, P. C. 1002; 1 Leach, C. C. 311.

What circumstances are sufficient to constitute the offence of uttering, which must be attended with a guilty knowledge, and what proofs required to substantiate it, may be deduced from the following abstract of decided cases, which have been selected from among many others. Where a prisoner, charged with uttering a forged note to A. B., knowing it to be forged, gave forged notes to a boy who was not aware of their being forgeries, and directed the boy to pay away the note described in the indictment at A. B.'s, for the purchase of goods, and the boy did so, and brought back the goods and the change to the prisoner: it was held by the twelve judges, an uttering by the prisoner to A. B.; *Rex v. Giles*, Car. C. L. 191. So the delivering a box, containing, among other things, forged stamps, to the party's own servant, that he might carry them to an inn to be forwarded by a carrier to a customer in the country, is an uttering. And if the delivery be in one county, and the inn to which they are carried by the servant in another, the prisoner may be indicted in the former. The offence of uttering a forged stamp will be complete, although at the time of uttering, certain parts of the stamp

are concealed; all the parts that are visible being like those of a genuine stamp; *Rex v. Collicott*, R. & R. C. C. 212. It is not necessary that a promissory note should be negotiable, in order to be the subject of an indictment for forging or uttering it; *Rex v. Box*, id. 300. An indictment for uttering forged notes, need not state to whom they were disposed of, it is sufficient to state that the prisoner disposed of the notes with intent to defraud the bank, he knowing them at the time to be forged, and although the person to whom they were disposed of purchased them as and for forged notes, and purchased them on his own solicitation, and as agent for the bank, for the purpose of bringing the prisoner to punishment; *Rex v. Holden*, id. 154. Uttering a forged order for the payment of money under a false representation, is evidence of knowing it to be forged; id. 169. To prove the guilty knowledge of an utterer of a forged bank note, evidence may be given of the prisoner's having previously uttered other forged notes knowing them to be forged; *Rex v. Whiley*, 2 Leach, C. C. 983. So upon an indictment for uttering a forged note, evidence is admissible of the prisoner's having, at a former period, uttered others of a similar manufacture; and that others of similar fabrication had been discovered on the files of the bank with the prisoner's handwriting on the back of them, in order to shew the prisoner's knowledge of the note mentioned in the indictment being a forgery; *Rex v. Ball*, R. & R. C. C. 132. But in order to shew a guilty knowledge on an indictment for uttering forged bank notes, evidence

East India bonds (*u*); of writings under the seal of the London, or Royal Exchange Assurance (*w*) (78); of the hand of the receiver of the prelines (*x*) (79); or of the accountant general and certain other officers of the Court of Chancery (*y*) (80); of a letter of attorney or other power to receive or transfer stock or annuities; and on the personating a proprietor thereof, to receive or transfer such annuities, stock, or dividends (*z*) (81); also on the personating, or procuring to be personated, any seaman or other person, entitled to wages or other naval emoluments, or any of his personal representatives; and the taking, or procuring to be taken, any

(*u*) Stat. 12 Geo. I. c. 32.

(*w*) Stat. 6 Geo. I. c. 18.

(*x*) Stat. 32 Geo. II. c. 14.

(*y*) Stat. 12 Geo. I. 32.

(*z*) Stat. 8 Geo. I. c. 22; 9 Geo. I. c. 12; 31 Geo. II. c. 22, § 27.

of another uttering, *subsequent* to the one charged, is inadmissible, except the latter uttering was in some way connected with the principal case, or it can be shewn that the notes were of the same manufacture; for only previous, or contemporaneous acts, can shew, *quo animo*, a thing is done; *Rex v. Taverner*, Car. C. L. 195.

So, if a second uttering be made the subject of a distinct indictment, it cannot be given in evidence to shew a guilty knowledge in a former uttering; *Rex v. Smith*, 2 C. & P. 633. The person whose name is forged was formerly held to be not a competent witness to prove the forgery; *Rex v. Russell*, 1 Leach, C. C. 8. But he has recently been made competent by the 9 Geo. IV. c. 32, § 2.

(76) See on this subject, *Rex v. Aslett*, R. & R. C. C. 67.

(77) All lotteries are now abolished, *Vide ante*, 168, note (17).

(78) See 39 Geo. III. c. 83, § 22, on this subject.

(79) *Vide* 52 Geo. III. c. 143, relative to prelines.

(80) Forging a paper writing, purporting to be an office copy of a report of the accountant general's, of money being paid into the bank, and also an

office copy of a certificate of one of the cashiers of the bank, was held to be within the 12 Geo. I. c. 32, § 9; *Rex v. Gibson*, 1 Leach, C. C. 61.

(81) An indictment for forging a transfer of stock, is good, although the stock had never been accepted by the person in whose name it stood, and although the transfer was not witnessed according to the rules and directions of the bank; *Rex v. Gade*, 2 Leach, C. C. 732. Upon an indictment for forging, or uttering a power of attorney to sell and transfer stock in the funds, the person whose name is forged is a competent witness for the crown, if the stock has not been transferred, and he has given notice to the bank disavowing the power; especially if it be previously proved, though there is an attestation importing that he executed in the presence of two witnesses, that he did not so execute in their presence; the Bank Act not authorizing any transfer under a power of attorney, unless it is attested by two witnesses; *Rex v. Wail*, R. & R. C. C. 505. And it will make no difference whether the stock was the property of the person whose name is forged, or whether he was a mere trustee; *Id.*

false oath in order to obtain a probate, or letters of administration, in order to receive such payments (82); and the forging, or procuring to be forged, and likewise the uttering, or publishing, as true, of any counterfeited seaman's *will or power (a) (83): to which may be added, though not strictly

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(a) Stat. 31 Geo. II. c. 10; 9 Geo. III. c. 30.

(82) Personating a seaman who is dead is within the Act, as where a prisoner applied at Greenwich hospital for prize money in the name of J. B., and J. B. was dead, and supposed to be so at the hospital, though the prisoner did not obtain the money, he was convicted of the offence; *Rex v. Martin*, R. & R. C. C. 324. So where a prisoner personated one "S. Cuff," who was dead, and whose prize money had been paid to his mother, it was held, that it did not vary the prisoner's guilt, and that he might be convicted; *Rex v. Cramp*, id. 327. To constitute the offence of personating the name of a seaman under the 57 Geo. III. c. 127, § 4, the person entitled, or really supposed to be so, to prize money, must be personated; personating a man who never had any connexion with the ship, is not an offence within the Act; *Rex v. Tannet*, id. 351. By 59 Geo. III. c. 56, § 3, persons falsely representing themselves as the next of kin of any seaman, &c., or any agent whose authority is revoked, offering to receive wages, pay, prize money, or other allowance, are guilty of a misdemeanor; by § 12, inserting a false date in any order for the payment of prize money, is made a misdemeanor; and by § 17, persons really entitled to prize money, &c., using false orders or certificates to procure the same, are guilty of a misdemeanor.

And see 5 Geo. IV. c. 107, § 5, upon the same subject. Under this statute all persons who aid and abet in the offence are principals; *Rex v. Potts*, R. & R. C. C. 353.

As to the offence of personating military persons, see 7 Geo. IV. c. 16,

§ 38, which makes that offence a felony, punishable with transportation for life, or for such term as the court shall adjudge.

As to the like offence relative to army prize-money, see 2 W. IV. c. 53, § 49, making it a felony, punishable with transportation for life, or for any term not less than seven years.

(83) See also 55 Geo. III. c. 60, § 31, & 59 Geo. III. c. 56, by the 18th § of which, the falsely personating officers, seamen, marines, supernumeraries, &c., entitled to wages, or their representatives, or forging or uttering any letter of attorney, order, bill, ticket, or other certificate, assignment, last will, or other power whatsoever, in order to obtain any prize money, &c.; or uttering any such letter of attorney, order, bill, &c., knowing the same to be forged, in order to receive any prize money, &c.; or taking a false oath to obtain a probate or letters of administration in order to receive prize money, &c.; or demanding, or receiving wages, &c., knowing the will to be forged, or the probate or administration to have been obtained by a false oath with intent to defraud, is made a capital felony. By 1 & 2 Geo. IV. c. 49, § 3, procuring persons to sign a false petition under this Act, or procuring others to demand money due, or supposed to be due, to seamen, &c., under a certificate from the inspector of seamen's wills, is punishable with transportation for seven years; and, by § 4, procuring others to utter any forged letter of attorney, or other document, to obtain seamen's wages, &c., or procuring others to demand or receive such wages, &c., is punishable with death. By 7 Geo. IV.

reducible to this head, the counterfeiting of Mediterranean passes, under the hands of the lords of the admiralty, to protect one from the piratical states of Barbary (*b*); the forging or imitating of any stamps to defraud the public revenue (*c*) (84); and the forging of any marriage register or licence (*d*) (85); all which are by distinct Acts of Parliament made felonies, without benefit of clergy. By statutes 13 Geo. III. c. 52 and 59, forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offences of the like tendency, are punished with transportation for fourteen years (86). By statute 12 Geo. III. c. 48, certain frauds on the stamp duties, therein described, principally by using the same stamps more than once, are made single felony, and liable to transportation for seven years. And the same punishment is inflicted by statute 13 Geo. III. c. 38, on such as counterfeit the common seal of the corporation for manufacturing plate-glass, thereby erected, or knowingly demand money of the company by virtue of any writing under such counterfeit seal (87).

There are also certain other general laws, with regard to forgery; of which the first is 2 Geo. II. c. 25, whereby the first offence in forging or procuring to be forged, acting or assisting therein, or uttering or publishing as true any forged deed, will, bond, writing obligatory, bill of exchange, promissory note, indorsement, or assignment thereof, or any

(*b*) Stat. 4 Geo. II. c. 18.

(*d*) Stat. 26 Geo. II. c. 33.

(*c*) See the several Stamp Acts.

c. 16, § 38, the personating any Chelsea pensioner, &c., or forging any documents, or knowingly uttering such forgeries to obtain any pension, &c., is punishable with transportation for life or otherwise. A bill, drawn on the commissioners of the navy for pay, may be a bill of exchange, and a person may be indicted for the forgery of it as such, *Rex v. Chisholm*, R. & R. C. C. 297.

(84) By 6 Geo. IV. c. 106, forging or uttering the drafts or other instrument of the receiver general or controller general of the customs, is a capital felony. Vide also as to stamps, 52 Geo. III. c. 143; 55 Geo. III. c. 184,

and c. 185; and 6 Geo. IV. c. 116, which makes it a capital felony to forge or utter forged stamps to newspapers.

(85) This punishment is repealed by 4 Geo. IV. c. 76, and transportation for life substituted. Vide *ante*, 163, note (5).

(86) See 52 Geo. III. c. 143; 55 Geo. III. c. 185, on this subject, which severally impose the punishment of death for such offences.

(87) And by 24 Geo. III. sess. 2, c. 27, to forge the superscription of any letter in order to avoid the payment of the postage, is a felony punished by transportation for seven years.

acquittance or receipt for money or goods, with intention to defraud any person, or corporation (*e*), is made felony without benefit of clergy (88). And by statutes 7 Geo. II. c. 22, and 18 Geo. III. c. 18, it is equally penal to forge or cause to be forged or utter as true a counterfeit acceptance of a bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or any *other security for money; or any warrant or order for the payment of money, or delivery of goods (89) (90). So that, I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived, wherein forgery, that tends to defraud, whether in the name of a real or fictitious person (*f*), is not made a capital crime (91) (92). [*250]

(*e*) Stat. 31 Geo. II. c. 22, § 78.

(*f*) Fost. 116, &c.

(88) In the case of *Ann Lewis*, Foster, C. L. 116, it was decided, that a forged deed, purporting to be a power of attorney from A. B., administratrix of her father, E. D., a mariner, empowering E. F. to receive from the navy-office the wages due to the deceased, was within the letter and meaning of the statute, although it appeared such seaman died childless, and consequently there was no such person as his daughter in rerum natura; 1 Hawk. P. C. 309.

So it was held, that a power of attorney, under seal, to transfer stock in the public funds, was a *deed*; and the uttering of such a power of attorney, knowing it to be forged, an uttering of a *forged deed* within the repealed statute 2 Geo. II. c. 25, § 1, and a capital offence under that statute. *Rex v. Fauntleroy*, 1 Carrington, N. P. C. 421, where all the authorities upon this subject are collected; and vide post, note (91), and the cases there set forth, as to bills of exchange, &c.

(89) An order to a shopkeeper in a forged name to deliver goods to the bearer is not a forgery; the order must import that the person giving it has or at least claims, an interest in the money or goods, which are the subject-matter

of it, that he has or at least assumes a disposing power over such money or goods, and takes upon himself to transfer the property, or custody of them to the person in whose favour such order is made; *Mitchel's case*, Fost. 120. And it must be directed to the person, who has the custody of the goods; *Clench's case*, Leach, 437. But a draft upon a banker in the name of a person who kept no cash at the banker's shop, is a forgery, as it assumes that there was cash kept at the house, which the drawer had authority to dispose of; *Locket's case*, id. 89.

(90) See 49 Geo. III. c. 35; and 8 Geo. IV. c. 8, respecting widows' pensions, remittance bills, the forging of which, or procuring others to forge them, is made a felony punishable with transportation.

(91) It has frequently been determined, that drawing, indorsing, or accepting a bill of exchange in a fictitious name is a forgery; *Bolland's case*, &c., Leach, 78, 159, 192; 1 Hen. Black. 588; Fost. 116. It is also forgery to fabricate a will by counterfeiting the name of a pretended testator, who is still living; *Cogan's case*, id. 355.

If a person puts his own name to an instrument, representing himself to be

Recapitulation
of the contents
of the chapter.

These are the principal infringements of the rights of property: which were the last species of offences against individuals or private subjects, which the method of distribution has led us to consider. We have before examined the nature of all offences against the public, or commonwealth; against the king or supreme magistrate, the father and protector of that community; against the universal law of all civilized nations; together with some of the more atrocious offences of publicly pernicious consequences, against God and his holy religion. And these several heads comprehend the whole circle of crimes and misdemeanors, with the punishment annexed to each, that are cognizable by the laws of England (93).

a different person of that name with an intent to defraud, he is guilty of forgery; 4 T. R. 28.

But where a bill of exchange is indorsed by a person in his own name, and another represents himself to be that person, he is not guilty of forgery, but it is a misdemeanor; *Hevey's case*, Leach, 268.

A bill or note may be produced in evidence against a prisoner prosecuted for the forgery of it; and he may be convicted upon the usual evidence of the forgery, though it has never been stamped pursuant to the Stamp Acts; *Hawkeswood's* and *Reculist's cases*, Leach, 292 and 811. For the forgery in such a case is committed with an intent to defraud; and the legislature meant only to prevent their being given in evidence, when they were proceeded upon to recover the value of the money thereby secured.

Every indictment for forgery must set out the forged instrument in words and figures; *Mason's case*, 1 East, 182.

But it is sufficient to set forth the receipt at the bottom of an account, without setting out the account itself; *Testick's case*, *ibid.* 181. The word *purport*, in an indictment for forgery, signifies the substance of an instrument, as it appears on the face of it; *tenor* means an exact copy of it; *ibid.* 180; Leach, 753.

(92) See 1 Hawk. P. C. 21 throughout, and the cases there collected.

(93) Notwithstanding the extensive alterations which have recently been made in the statute law relating to forgery, the preceding notes upon the subject will, it is believed, be still found relevant; it will, however, be necessary here briefly to notice in what the alterations above alluded to consist.

By 1 W. 4, c. 66, § 31, the following statutes, so far as they relate to the crime of forgery, are repealed:—25 Edw. III. st. 5, c. 2; 1 Mary, st. 2, c. 6; 5 Eliz. c. 14; 4 W. & M. c. 4, § 4; 8 & 9 W. III. c. 20, § 36; 7 Ann. c. 21, § 9; 8 Geo. I. c. 22, § 1; 12 Geo. I. c. 32, § 9; 2 Geo. II. c. 25, except § 2; 7 Geo. II. c. 22; 15 Geo. II. c. 13, § 11; 31 Geo. II. c. 32, §§ 77, 78; 4 Geo. III. c. 25, § 15; 13 Geo. III. c. 79; 18 Geo. III. c. 18; 27 Geo. III. c. 43, § 4; 33 Geo. III. c. 30; 37 Geo. III. c. 122; 41 Geo. III. (U. K.) c. 39; 41 Geo. III. c. 57; 43 Geo. III. c. 139, §§ 1, 2; 45 Geo. III. c. 89; 48 Geo. III. c. 1, § 9; 52 Geo. III. c. 138; 52 Geo. III. c. 148, § 14; 4 Geo. IV. c. 76, § 29. But offences committed against any of these Acts previous to their repeal, may be tried under them after their repeal. Provided always, That if the offender shall after the commencement of this Act be con-

victed of the same, and such offence shall have been made punishable with death by any of the said several Acts, but shall not be made punishable with death by this act, in every such case the person convicted of such offence shall not suffer the punishment of death, but shall in lieu thereof be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four, nor less than two years.

By sect. 32, this Act shall commence and take effect on the 21st July, 1830.

By the same statute, sect. 1, no forgeries shall continue capital unless made so by this Act; and all forgeries not declared capital by this Act shall be punished with transportation or imprisonment, except as to the coin.

But by the subsequent statute, 2 & 3 W. IV. c. 123, § 1, reciting the former statute, persons afterwards convicted of offences punishable under the former statute with death, shall be transported for life;

Except, sect. 2, persons convicted of forging or altering wills and certain powers of attorney.

By 1 W. IV. c. 66, § 23, the punishments of 5 Eliz. c. 111, shall be repealed, and other punishments substituted.

By sect. 26, the court may order hard labour or solitary confinement.

By sect. 2, forging the great seal, privy seal, privy signet, royal sign manual, &c., is treason and capital.

By sect. 3, forging an exchequer bill, exchequer debenture, East India bond, bank note, will, bill of exchange, promissory note, or warrant or order for payment of money, is capital.

By sect. 4, if any instrument, however designated, is in law a bill of exchange, &c., the forger of such instrument may be indicted under this Act.

By sect. 5, making false entries in the books in which the accounts of public stock are kept, or transferring public stock in any other name than the true owner's, is capital.

By sect. 6, forging a transfer of any public stock, or of certain other stock; power of attorney to transfer the same, or to receive the dividends thereon; transfer of stock, or receipt of dividends, by false personation, is capital.

By sect. 7, personating the owner of any public stock, or certain other stock, and endeavouring to transfer, or to receive the dividends, is punishable with transportation for life, &c.

By sect. 8, forging the attestation to any power of attorney for the transfer of stock, &c. is punishable with transportation for seven years, &c.

By sect. 9, clerks in the bank wilfully making out dividend warrants for a greater or less sum than is really due, may be transported for seven years, &c.

By sect. 10, forging a deed, bond, receipt for money or goods, or an accountable receipt, or an order for delivery of goods; is punishable with transportation for life, &c.

By sect. 11, fraudulently acknowledging any recognizance, bail, fine, recovery, or judgment, in the name of another, is punishable with transportation for life, &c.

By sect. 12, knowingly purchasing, receiving, or having in possession forged bank notes, is punishable with transportation for fourteen years.

By sect. 13, making, or having, without authority, any mould for making paper with the words "Bank of England" visible in the substance, or for making paper with carved bar lines, &c. or selling such paper; is punishable with transportation for fourteen years.

Sect. 14, contains a proviso as to paper made for bills of exchange, &c.

By sect. 15, engraving on any plate, &c. any bank note, blank bank note, &c., or using or having such plate, &c., or uttering or having paper upon which a blank bank note, &c. shall be printed, without authority; is punishable with transportation for fourteen years.

By sect. 16, engraving on any plate, &c. any word, number, or ornament resembling any part of a bank note, &c., or using or having any such plate, &c.,

or uttering or having any paper on which there shall be an impression of any word, number, &c. ; is punishable with transportation for fourteen years.

By sect. 17, making, or having in possession, any mould for manufacturing paper, with the name of any bankers appearing in the substance; manufacturing or having such paper, or causing the name to appear in the substance of any paper; is punishable with transportation for fourteen years, &c.

By sect. 18, engraving on any plate, &c. any bill of exchange or promissory note of any bankers, or any words resembling the subscription subjoined thereto, or using any such plate, &c. ; or uttering or having any paper upon which any part of any such bill or note shall be printed; is punishable with transportation for fourteen years, &c.

By sect. 19, engraving plates, &c. for foreign bills or notes; using or having such plates, &c. ; or uttering any paper on which any part of such foreign bill or note may be printed; is punishable with transportation for fourteen years, &c.

By sect. 20, inserting any false entry in any register of baptisms, marriages, or burials; forging or altering any such entry; uttering any false or forged entry; destroying, &c. the register; forging any license of marriage; is pu-

nishable with transportation for life, &c.

By sect. 21, rectors, &c. shall not be liable to any penalty for correcting, in the mode prescribed, accidental errors in the register.

By sect. 22, inserting in any copy of a register of baptisms, marriages, or burials, transmitted to the registrar, any false entry; or forging, or verifying any copy knowing it to be false; is punishable with transportation for seven years, &c.

By sect. 24, all forgers and utterers may be tried in the county where they are apprehended or are in custody.

Sect. 25, regulates the punishment of principals in the second degree and accessaries.

Sect. 27, directs the mode of trial of offences committed at sea.

Sect. 28, gives a rule of interpretation as to criminal possession, and as to parties intended to be defrauded.

By sect. 29, this Act shall not extend to Scotland or Ireland.

By sect. 30, this Act shall apply to the forging or uttering in England documents purporting to be made, or actually made, out of England; and to the forging or uttering in England bills of exchange, promissory notes, bonds, &c. purporting to be payable out of England.

CHAPTER XVIII.

OF THE MEANS OF PREVENTING OFFENCES.

WE are now arrived at the fifth general branch, or head, under which I proposed to consider the subject of this book of our Commentaries; *viz.* the means of *preventing* the commission of crimes and misdemeanors. And really it is an honour, and almost a singular one, to our English laws, that they furnish a title of this sort; since *preventive* justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice (*a*); the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

This preventive justice consists in obliging those persons, whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour. This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors: but there also it must be understood rather as a caution against the repetition of the offence, than any immediate pain or punishment. And indeed, if we consider all human *punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past: since, as was observed in a former chapter (*b*); all punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example; all of which conduce to one and the same end, of preventing future crimes whether that can be effected by amendment, disability or example. But the caution, which we speak of at present, is such as is

Of the means
of preventing
offences, as,

recognizances
to keep the
peace, or to be
of good beha-
viour.

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(a) Beccar. ch. 41.

(b) See page 11.

intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen : and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension.

By the Saxon constitution these sureties were always at hand, by means of king Alfred's wise institution of decennaries or frankpledges ; wherein, as has more than once been observed (c), the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse and neglected, there hath succeeded to it the method of making suspected persons find particular and special securities for their future conduct : of which we find mention in the laws of king Edward the confessor (d) ; "*tradat fidejussores de pace et legalitate tuenda* (1)." Let us therefore consider, first, what this security is ; next, who may take or demand it : and lastly, how it may be discharged.

These securities
may be for a
time limited,
or for life ;

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1. This security consists in being bound, with one or more securities, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer ; whereby the parties acknowledge themselves to be indebted to the crown in the sum required, for instance 100*l.* with condition to be void and of none effect, if *the party shall appear in court on such a day, and in the mean time shall keep the peace ; either generally, towards the king, and all his liege people ; or particularly also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, or be of good behaviour, either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the statute 3 Hen. VII. c. 1, and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehaviour in the other, the recognizance becomes forfeited or absolute ; and, being *estreated* or extracted (taken out

(c) See vol. I. page 114.

(d) Cap. 18.

(1) He must give sureties for preserving the peace, and for good behaviour.

from among the other records) and sent up to the exchequer, the party and his sureties having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound (2).

2. Any justices of the peace, by virtue of their commission, or those who are *ex officio* conservators of the peace, as was mentioned in a former volume (e), may demand such security according to their own discretion (3); or it may be granted at

may be taken by any conservator of the peace at his own discretion, or may be demanded of him;

(e) See vol. 1, page 350.

(2) By 7 G. IV. c. 64, § 31, reciting, "that the practice of indiscriminately estreating recognizances for the appearance of persons to prosecute or give evidence, or to answer for a common assault, or in the other cases thereafter specified, had been found in many instances productive of hardship to persons who had entered into the same;" it is enacted, "that in every case where any person bound by recognizance for his or her appearance, or for whose appearance any other person shall be bound, to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy, shall therein make default, the officer of the courts by whom the estreats are made out shall, and is hereby required, to prepare a list in writing, specifying the name of every person so making default, and the nature of the offence, in respect of which every such person, or his or her surety, was so bound, together with the residence, trade, profession, or calling of every such person, and surety, and shall in such list distinguish the principals from the sureties, and shall state the cause, if known, why each such person has not appeared, and whether, by reason of the nonappearance of such person, the ends of justice have been defeated or delayed; and every such officer shall, and is hereby required, before any such recognizance shall be estreated, to lay

such list, if at a court of oyer and terminer, or gaol delivery, in any county besides Middlesex and London, or at a court of great sessions, or at one of the superior courts of the counties palatine, before one of the justices of those courts respectively; if at a court wherein a recorder or other corporate officer is the judge, or one of the judges, before such recorder or other corporate officer; and if at a session of the peace, before the chairman or two other justices of the peace who shall have attended such court, who are respectively authorized and required to examine such list, and to make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the justice, recorder, corporate officer, chairman, or justices of the peace, before whom respectively such list shall have been laid."

(3) But every recognizance must now be taken according to certain prescribed rules and forms. By statute 3 G. IV. c. 46, § 4, every justice, before whom any recognizance shall be entered into or taken, shall give, or cause to be given, at the time of entering into such recognizance, to the person or persons, surety or sureties, so entering into the same, and to each of them, a written or printed paper, or notice, in the form, or to the effect,

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the request of any subject, upon due cause shewn, provided such demandant be under the king's protection; for which reason it has been formerly doubted, whether Jews, Pagans, or persons convicted of a *præmunire*, were entitled thereto (*f*). Or, if the justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit*, issuing out of the Court of King's Bench or Chancery; which will compel the justice to act, as a ministerial and not as a judicial officer: and he must make a return to such writ, specifying his compliance, under his hand and seal (*g*). But this writ is seldom used: for, when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8. And indeed a peer or peeress cannot be bound over in any other place than the courts of *King's Bench or Chancery: though a justice of the peace has a power to require sureties of any other person, being *compos mentis* and under the degree of nobility, whether he be a fellow justice or other magistrate, or whether he be merely a private man (*h*). Wives may demand it against their husbands: or husbands, if necessary, against their wives (*i*). But feme coverts, and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are

(*f*) 1 Hawk. P. C. 126.(*h*) 1 Hawk. P. C. 127.(*g*) F. N. B. 80; 2 P. Wms. 202.(*i*) 2 Stra. 1207.

stated in the schedule marked (B), to the Act annexed,* adapting the same to the particular circumstances of the case; and every such justice shall, in such recognizance, state and particularly specify, not only the profession, art, mystery, or trade, of every person so entering into such recognizance, together with their christian name and names, and surnames, but

also the parish, township, or place of his or her residence; and in case such residence shall be in any city, town, or borough, shall also state and particularly specify the name of the street, and number of the house (if any) in which such person shall reside, and, also, whether owner or tenant thereof, or lodger therein.

* Schedule (B.)

____ } Take notice, that you
to wit. } of _____ are
bound in the sum of £ _____, and
your sureties _____ in the
sums of £ _____ each, to appear at the
quarter or general sessions of the peace
for the county of _____,

to be holden at _____, on the
day of _____ next; and
unless you personally make your appearance accordingly, the recognizances entered into by yourself and securities will be forthwith levied on you and your bail. Dated this
day of _____ 18 ____.
A. B. Justice of the Peace.

incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments (4).

8. A recognizance may be discharged, either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices, (as the quarter sessions, assizes, or King's Bench,) if they see sufficient cause (5): or in case

and may be discharged or forfeited by various means.

(4) But a person of the age of sixteen years is competent to enter into a recognizance conditioned to prosecute on a criminal charge; and if it be forfeited and estreated, the court will not discharge it, unless a sufficient case for relief be made out; *Ex parte Williams*, M'Clel. 483; 12 Price, 673.

(5) By 3 Geo. IV. c. 46, § 5, if any person on whose goods and chattels any sheriff, &c. shall be authorized to levy any forfeited recognizance, or sum of money to be paid in lieu or satisfaction thereof, shall give security to such sheriff, &c. for his appearance at the next general or quarter sessions, then and there to abide the decision of the court, and also to pay such forfeited recognizance or sum of money to be paid in lieu or satisfaction thereof, together with all such expences as shall be ordered and adjudged by the court; it shall be lawful for such sheriff, &c., and he is authorized and required, to discharge such person so giving such security out of custody: provided, that

in case such party so giving security shall not appear, in pursuance of his undertaking, it shall be lawful for the court forthwith to issue a writ of distringas and capias, or fieri facias and capias, against the sureties of the person so bound.

And by § 6, the court of general or quarter sessions, before whom any person committed, or bound to appear, shall be brought, is authorized and required to inquire into the circumstances of the case, and shall, at its discretion, be empowered to order the discharge of the whole of the forfeited recognizance, or sum of money paid, or to be paid, in lieu or satisfaction thereof, or any part thereof; and such order shall be made in the form or to the effect of the schedule marked (C) to the Act annexed, * and shall be signed by the clerk of the peace, which order shall be a discharge to such sheriff, &c., on the passing of his accounts at the Exchequer; and in all cases where the party shall have been

* Schedule (C).

To the sheriff, (&c.) of the county,
(&c.) of

Whereas, hath appeared before the justices assembled at the general, (&c.) sessions held at, on the day of, and has forfeited the sum of [describe the nature of the forfeiture], and having made it appear, to the satisfaction of the justices so assembled, that he should be relieved

from the payment of the said sum of, you are therefore hereby required to discharge the said sum of from the estreat roll delivered to you after the quarter sessions held at, for which discharge this warrant shall be your authority, and shall exonerate you from the said charge, on the final passing of your accounts at the Exchequer, &c.

By order of the Court.

he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued (*j*).

(*j*) 1 Hawk. P. C. 129.

lodged in gaol by such sheriff, &c., the justices are empowered either to remand such party, or to order such party to be discharged; and such order shall be a sufficient discharge to such sheriff, &c., on the passing of his accounts at the Exchequer; and it shall be lawful for the court to award such costs to be paid by either party as to them shall seem just.

By 4 Geo. IV. c. 37, the justices shall insert in any following roll, all fines, forfeited recognizances, &c. which have not been levied, and the sheriff shall detain the writs, which are to continue in force; where the sheriff goes out of office, he shall deliver such rolls and writs to his successor, who is to execute them; in all cases where the party is in another county, or has goods there, the sheriff shall send a warrant and a copy of the writ to the sheriff of such other county, who is to levy and make return in thirty days after receipt of such warrant; and the sheriffs and clerks of the peace shall make returns to the treasury.

The court of Exchequer has now no jurisdiction over recognizances forfeited at quarter sessions, whereof the yearly duplicate or certificate required by 3 Geo. IV. c. 46, § 14, has been delivered into the court. Therefore, where a recognizance for appearing and preferring an indictment at a quarter sessions, had been forfeited, and certified into the court of Exchequer; and the forfeiture had been levied by the sheriff, pursuant to 3 Geo. IV. c. 46; the court held, that they were not authorized to order the discharge of the recognizance, although the justice, before whom the recognizance had been taken, did not comply with § 4 of the statute, by giving the party bound notice of the

time and place at which the sessions were to be held; and the party had applied for relief at the ensuing quarter sessions, which was refused. The court of Exchequer has still jurisdiction over penalties, forfeitures, &c., occurring at assizes; *Rex v. Hankins*, 3 D. & R. M. C. 148. But see *Pellew's case*, 13 Price, 299; M'Clel. 111. The duplicate of fines, issues, amerciaments, and forfeited recognizances, required to be delivered into the Exchequer by the clerk of the peace, under 3 Geo. IV. c. 46, § 14, must be delivered in on oath. *Ex parte Hodgson*, 1 M. & R. M. C. 346; 2 Y. & J. 142.

"The enactment in 7 Geo. IV. c. 64, § 31, does not appear," says a learned writer on criminal law, "to make any alteration in the practice of the sessions as to moving to respite or discharge recognizances before they have become forfeited, as it only applies to cases of recognizances which have been forfeited; nor does it appear to affect the discretionary power given to the sessions to remit the forfeiture, under the statute 3 Geo. IV. c. 46, § 6." Car. C. L. 130. But *quære* how far the sessions have such discretionary power. The court of King's Bench have decided that under the 3 Geo. IV. c. 46, the sessions are empowered to discharge a forfeited recognizance in those cases *only* where the party has been committed to gaol, or has given security to appear at the sessions: and, therefore, that where a party, whose recognizance had become forfeited for not appearing to an indictment, and against whom process had issued, paid to the sheriff the sum mentioned in the recognizance, in order to prevent a sale of his goods, and the sessions afterwards by an order mitigated the recognizance to a small

Thus far what has been said is applicable to both species of recognizances, for the *peace*, and for the *good behaviour: de pace, et legalitate, tuendâ*, as expressed in the laws of king Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them, I shall now consider them separately: and first, shall shew for what cause such a recognizance, with sureties for the *peace*, is grantable; and then, how it may be forfeited.

1. Any justice of the peace may, *ex officio*, bind all those to keep the peace, who in his presence make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons *or attendance, to the terror of the people; and all such as he knows to be common barretors; and such as are brought before him by the constable for a breach of the peace in his presence: and all such persons, as, having been before bound to the peace, have broken it and forfeited their recognizances (k). Also, wherever any private man has just cause to fear that another will burn his house, or do him a corporal injury, by killing, imprisoning him, or beating him, or that he will procure others so to do, he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will shew that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also

Who may be bound over to keep the peace.

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Who may demand surety of the peace.

(k) 1 Hawk. P. C. 126

sum, and directed the sheriff to discharge the residue from the recognizance, such order was void; and that the party was not entitled to recover from the sheriff the sum which the sessions had ordered to be discharged; *Haynes v. Hayton*, 7 B. & C. 293; 2 C. & R. 621.

Where a defendant, indicted at the quarter sessions for a conspiracy, had entered into insufficient recognizances, it was held that the court of King's Bench, on a removal by certiorari, might discharge them on motion, and

compel him to enter into better securities; *Rex v. Horper*; 1 Chit. R. 491. A person of the age of sixteen is competent to enter into a recognizance to prosecute; and if it be forfeited and estreated, the court will not discharge it, unless a sufficient case for relief be made out. *Ex parte Williams*, M'Clel. 493. A defendant having been committed on a forfeited recognizance, his wife and family becoming burthensome to the parish, is not a sufficient ground to discharge him; *Rex v. Stauncher*, 3 Price, 261.

farther swear, that he does not require such surety out of malice or for mere vexation (*l*). This is called *swearing the peace* against another: and, if the party does not find such sureties, as the justice in his discretion shall require, he may immediately be committed till he does (*m*) (6).

By what means these recognizances may be forfeited.

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, to the person of him who demanded it, if it be a special recognizance: or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the

(*l*) 1 Hawk. P. C. 127.

(*m*) Ibid. 128.

(6) A justice of the peace is authorized to require sureties of the peace for a limited time, according to his discretion, and need not bind the party over to the next sessions only; *Willes v. Bridger*, 2 B. & A. 278. And the court of king's bench will not interfere with the discretion of magistrates in taking security for keeping the peace; *Rex v. Tregarthan*, 2 Nev. & Man. 379. As all persons present, countenancing a prize fight, are guilty of an offence, whenever a prize fight is expected the magistrates ought to cause the intended combatants to be brought before them, and compel them to enter into securities to keep the peace till the assizes or sessions; and, if they refuse to enter into securities, to commit them; *Rex v. Billingham*, 2 C. & P. 234. An attachment upon articles of the peace is bailable before justices of the county; *Rex v. Bomaster*, 1 W. Bl. 233. Articles of the peace ought to be exhibited in the neighbourhood, that the security may be given there; *Rex v. Waite*, 2 Burr. 780; 2 Ld. Keny. 511. Where a person exhibits articles of the peace, and swears that his life is in danger, the truth of the facts cannot be controverted; *Rex v. Doherty*, 13 East, 171; *Lord Vane's case*, Id. 172, n. There ought to be a reasonable foundation on the face of the articles, to induce a fear of personal danger, before

the court will require sureties of the peace; Id. *ibid*. A wife may sue a *supplicavit* in chancery against her husband, and to find sureties not to beat or ill treat her, *aliter quam causâ regiminis et castigationis*; Id. *Ibid*. Upon articles of the peace exhibited, the court have power of requiring bail for such a length of time as they shall think necessary for the preservation of the peace, and are not confined to a twelvemonth; *Rex v. Bowes*, 1 T. R. 696. Where articles of the peace appeared malicious and untrue, the court stayed process on them, and committed the exhibitant for perjury; *Rex v. Parnell*, 2 Burr. 806; and see 3 Burr. 1922. The court will not receive articles of the peace, if the parties live at a distance in the country, unless they have previously made application to a justice in the neighbourhood; 2 Burr. 780. And if the court do receive them, the secondary may indorse the attachment in the form required, and order a justice of the county to take the security; id. 1039; 1 Bla. 233. It has been held that the affirmation of a quaker is not sufficient on which to grant surety of the peace; *Rex v. Grun*, 1 Stra. 527; 12 Mod. 243; but now that the evidence of quakers is admissible on affirmation in all criminal cases, (9 Geo. IV. c. 32, § 1), the rule would not, it is presumed, hold good.

many species of offences which were mentioned as crimes against the public peace in the eleventh chapter of this book: or, by any private violence committed against any of his Majesty's subjects. But a bare trespass upon the land or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance (*n*). Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance, (being looked *upon to be merely the effect of unmeaning heat and passion,) unless they amount to a challenge to fight (*o*) (7).

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The other species of recognizance, with sureties, is for the *good abearance*, or *good behaviour*. This includes security for the peace, and somewhat more; we will therefore examine it in the same manner as the other.

1. First, then, the justices are empowered by the statute 34 Edw. III. c. 1, to bind over to the good behaviour towards the king and his people, all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expres-

Who may be bound over to the good behaviour.

(*n*) 1 Hawk. P. C. 131.

(*o*) Ibid. 130.

(7) The demise of the king is a discharge of a recognizance for keeping the peace; for the condition being, *servare nostram pacem*, his successor cannot take advantage of a breach thereof; Bro. Abr. *Peace*, Pl. 15; 1 Hawk. P. C. c. 60. A recognizance for keeping the peace may be forfeited by any actual violence to the person of another, whether it be done by the party bound, or others by his procurement; Lamb. 115, 127; Bro. Abr. *Peace*, Pl. 2; 1 Hawk. P. C. c. 60. In support of a rule to stay proceedings in a scire facias upon a recognizance for keeping the peace, it was said that the assault, which had been made, was not upon him at whose request the surety of the peace was granted, but upon another person. It

was held that this made no difference, and the rule was discharged; *Rex v. Stanley*, MS. Trin. 27 Geo. II. But a recognizance for keeping the peace is not forfeited, where an officer, having a warrant against one who will not suffer himself to be arrested, beats or wounds him in the attempt to take him; Lamb. 128; 1 Hawk. P. C. c. 60. So, it is not forfeited, if a parent in a reasonable manner chastises his child; a master his servant, being actually in his service at the time; a schoolmaster his scholar; a gaoler his prisoner; a husband his wife; 1 Sid. 176-7; Lamb. 127-8; Hetl. 149-50; 1 Hawk. P. C. c. 60; F. N. B. 80; Jacob, L. D. *Surety of the Peace*. And see 5 Chit. Barn, *Recognizance, Surety of the Peace*.

sion, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem*; as, for haunting bawdy-houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all nightwalkers; eavesdroppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wake in the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons, whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame: an expression, it must be owned, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But, if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one (*p*).

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By what means
the recogni-
zances may be
forfeited.

2. A recognizance for the good behaviour may be forfeited by all the same means, as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or by committing any of those acts of misbehaviour, which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen (*q*): for, though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance (8).

(*p*) 1 Hawk. P. C. 132.

(*q*) 1 Hawk. P. C. 133.

(8) See generally, on this subject, 5 Chit. Burn, tit. *Recognizance, Surety of the Peace*.

CHAPTER XIX.

OF COURTS OF A CRIMINAL JURISDICTION.

THE sixth, and last, object of our inquiries will be the method of *inflicting* those *punishments*, which the law has annexed to particular offences; and which I have constantly subjoined to the description of the crime itself. In the discussion of which I shall pursue much the same general method that I followed in the preceding book, with regard to the redress of civil injuries: by, first, pointing out the several *courts* of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and by, secondly, deducing down, in their natural order, and explaining, the several *proceedings* therein.

Of criminal courts and their proceedings.

First, then, in reckoning up the several *courts* of criminal jurisdiction, I shall, as in the former case, begin with an account of such as are of a *public* and *general* jurisdiction throughout the whole realm; and, afterwards, proceed to such as are only of a *private* and *special* jurisdiction, and confined to some particular parts of the kingdom.

I. In our inquiries into the criminal courts of *public* and *general* jurisdiction, I must in one respect pursue a different order from that in which I considered the civil tribunals. For there, as the several courts had a gradual subordination to each other, the superior correcting and reforming the errors of the inferior, I thought it best to begin with the lowest, and to ascend gradually to the courts of appeal, or those of *the most extensive powers. But, as it is contrary to the genius and spirit of the law of England, to suffer any man to be tried twice for the same offence in a criminal way, especially if acquitted upon the first trial; therefore these criminal courts may be said to be all independent of each other: at least so far, as that the sentence of the lowest of them can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter of law, apparent upon the face of the record; though sometimes causes may be removed from one to the other before trial. And

I. Those of a public and general jurisdiction, which are independent of each other.

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therefore as, in these courts of criminal cognizance, there is not the same chain and dependence as in the others, I shall rank them according to their dignity, and begin with the highest of all; *viz.*

1. Parliament the supreme court in the kingdom, for making and executing laws; peers and commoners may be impeached in parliament; a pardon under the great seal is not pleadable to an impeachment by the commons.

1. The high court of *parliament*; which is the supreme court in the kingdom, not only for the making, but also for the execution, of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata*, and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom (*a*). A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanors (*b*): a peer may be impeached for any *crime (1) (2). And they usually (in cases of an impeach-

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(*a*) 1 Hal. P. C.* 150.

(*b*) When, in 4 Edw. III. the king demanded the earls, barons, and peers, to give judgment against Simon de Bereford, who had been a notorious accomplice in the treasons of Roger earl of Mortimer, they came before the king in parliament, and said all with one voice, that the said Simon was not their *peer*; and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and proviso was entered in the parliament roll: "And it is assented and accorded by our lord the king, and all the great

men, in full parliament, that albeit the peers, as judges of the parliament, have taken upon them in the presence of our lord the king to make and render the said judgment; yet the peers who now are, or shall be in time to come, be not bound or charged to render judgment upon others than peers; nor that the peers of the land have power to do this, but thereof ought ever to be discharged and acquitted; and that the aforesaid judgment now rendered be not drawn to example or consequence in time to come, whereby the said peers may be charged hereafter to judge others than their peers, contrary to the laws of the land, if the like case happen, which God forbid." (*Rot. Parl.* 4 Edw. III. n. 2 & 6. 2 Brad. Hist. 190. Selden. judic. in parl. ch. 1.)

(1) For misdemeanors, as libels, riots, &c., peers are to be tried, like com-

moners, by a jury, for, "at the common law, in these four cases only, a peer

ment of a peer for treason) address the crown to appoint a lord high steward, for the greater dignity and regularity of their proceedings; which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king (c); but it hath of late years been strenuously maintained (d), that the appointment of an high steward in such cases is not indispensably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bill of indictment, found by the house of Commons, and afterwards tried by the Lords; who, are, in cases of misdemeanors, considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient Ger-

(c) 1 Hal. P. C. 350.

Com. Journ. 15 May, 1679. Fost.

(d) Lords' Journ. 12 May, 1679.

142, &c.

shall be tried by his peers, viz., in treason, felony, misprision of treason, and misprision of felony; and the statute law which gives such trial, hath reference unto these, or to other offences made treason or felony; his trial by his peers shall be as before; and to this effect are all these statutes, viz. 32 H. VIII. c. 4, Rastall, 404, pl. 10; 33 H. VIII. c. 12, Rastall, 415; 35 H. VIII. c. 2. Rastall, 416; and in all these express mention is made of trial by peers. But in this case of a præmunire, the same being only in effect but a contempt, no trial shall be here in this of a peer by his peers." Per Fleming, C. J., assented to by the whole court, in *Rex v. Lord Vaux*, 1 Bulstr. 197.

(2) But according to the last resolution of the house of Lords, a commoner may be impeached for a capital offence. On the 26th of March, 1680, Edward Fitzharris, a commoner, was impeached by the commons of high treason, upon which the attorney-general acquainted the peers that he had an order from the king to prosecute Fitzharris by indictment, and a question thereupon was put, whether he should be proceeded against according to the course of the common law or by way of

impeachment, and it was resolved against proceeding in the impeachment; 13 *Lords' Journ.* p. 755. Fitzharris was afterwards prosecuted by indictment, and he pleaded in abatement that there was an impeachment pending against him for the same offence; but this plea was overruled, and he was convicted and executed. But on the 26th of June, 1689, Sir Adam Blair and four other commoners were impeached for high treason, in having published a proclamation of James the second: on the 2d of July a long report of precedents was produced, and a question was put to the judges whether the record 4 Edw. III. No. 6, was a statute: they answered, as it appeared to them by the copy, they believed it to be a statute; but if they saw the roll itself, they could be more positive. It was then moved to ask the judges, but the motion was negatived, whether by this record the lords were barred from trying a commoner for a capital crime upon an impeachment of the commons. And they immediately resolved to proceed in this impeachment, notwithstanding the parties were commoners and charged with high treason. 14 *Lords' Journ.* p. 260. The impeachment, however, was not proceeded in.

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mans : who, in their great councils, sometimes tried capital accusations relating to the public : “ *licet apud consilium accusare quoque, et discrimen capitis intendere* (e) (3).” And it has a peculiar propriety in the English constitution ; which has much improved upon the ancient model imported hither from the continent. For, though in general the union of the legislative and judicial powers ought to be most carefully avoided (f), yet it may happen that a subject, intrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either *dares not or cannot punish. Of these the representatives of the people, or house of Commons, cannot properly *judge* ; because their constituents are the parties injured : and can therefore only *impeach*. But before what court shall this impeachment be tried ? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason therefore will suggest, that this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests, nor the same passions, as popular assemblies (g). This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics ; where the people were at the same time both judges and accusers. It is proper that the nobility should judge, to ensure justice to the accused ; as it is proper that the people should accuse, to ensure justice to the commonwealth. And, therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the house of Commons in the case of the earl Danby in the reign of Charles II. (h) ; and it is now enacted by statute 12 and 13 W. III. c. 2, that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament (i) (4).

(e) Tacit de mor. Germ. 12.

(h) Com. Journ. 5 May, 1679.

(f) See vol. I. page 269.

(i) See ch. 31.

(g) Montesc. Sp. L. xi. 6.

(3) It is lawful, also, to accuse a man before the council, and to try capital charges there.

(4) But after the proceedings are finished, the prerogative of the king does not appear to be further limited.

2. The court of the *lord high steward* of Great Britain (*k*) is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either (*l*). The office of this great magistrate is very ancient; and was formerly hereditary, or at least held for life, or *dum bene se gesserit*; but now it is usually, and hath been for many centuries past (*m*), granted *pro hac vice* only; and it hath been the constant practice (and therefore seems now to have become necessary) to grant *it to a lord of parliament, else he is incapable to try such delinquent peer (*n*). When such an indictment is therefore found by a grand jury of freeholders in the King's Bench, or at the assizes before the justices of *oyer* and *terminer*, it is to be removed by a writ of *certiorari* into the court of the lord high steward, which only has power to determine it. A peer may plead a pardon before the court of King's Bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high steward, merely for the purpose of receiving such plea. But he may not plead, in that inferior court, any other plea; as *guilty* or *not guilty*, of the indictment: but only in this court: because, in consequence of such plea, it is possible that judgment of death might be awarded against him. The king, therefore, in case a peer be indicted for treason, felony, or misprision, creates a lord high steward *pro hac vice* by commission under the great seal; which recites the indictment so found, and gives his grace power to recite and try it *secundum legem et consuetudinem Angliæ*. Then, when the indictment is regularly removed, by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant at arms, to summon the lords to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers: then the number came to be indefinite; and the custom was, for the lord high steward to summon as many as he thought

2. The lord high steward's court; in which all peers of parliament have a right to sit and vote;

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(*k*) 4 Inst. 58; 2 Hawk. P. C. 5, 421; 2 Jon. 54.

(*l*) 1 Bulstr. 198.

(*m*) Pryn. on 4 Inst. 46.

(*n*) *Quand un seigneur de parlement serra arreïn de treason ou felony, le roy par ses lettres patents fera un grand et sage seigneur d'estre le grand seneschal d'Antleterre; qui, doit faire un precept, pur faire venir xx seigneurs, ou xviii,*

&c. (Yearb. 13 Hen. VIII. 11.) See Staundf. P. C. 152; 3 Inst. 28; 4 Inst. 59; 2 Hawk. P. C. 5; Barr. 234.—

“Where a peer of parliament shall be arraigned of treason or felony, the king, by his letters patent, shall create some noble and sage peer to be the grand seneschal of England; who must issue his precept, to cause to assemble twenty peers, or eighteen,” &c.

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proper, (but of late years not less than twenty-three (o), and that those lords only should sit upon the trial (5): which threw a monstrous weight of power into the hands of the crown, and this its great officer, of selecting only such peers as the then predominant party should most approve of. And, accordingly, when the earl of Clarendon fell into disgrace with Charles II. *there was a design formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court (p). But now, by statute 7 W. III. c. 3, upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery. (6).

During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last mentioned, of our lord the *king in parliament* (q). It is true, a lord high steward is always appointed in that case, to regulate and add weight to the proceedings: but he is rather in the nature of a speaker *pro tempore*, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high

(o) Kelynge, 56.

(q) Fost. 141.

(p) Carte's Life of Ormonde, vol. ii.

(5) The decision is by a majority, but a majority cannot convict, unless it consists of twelve or more.—CH.

(6) As a peer cannot have the benefit of a challenge like a commoner, (1 Harg. St. Tr. 198, 388,) it is somewhat surprising that this manifest improvement of the law and constitution was not extended to trials of peers for all felonies, in the court of the lord high steward. Lord Mountmorris informs us that there are but two instances of the trials of peers in Ireland, viz. of Viscount Netterville in 1743, and of

Lord Santry about the same time. The first was tried in the high court of parliament, the latter in the court of the high steward. They were both indicted for murder. Lord Netterville was acquitted, Lord Santry was convicted, but pardoned as to his life. Upon Lord Santry's trial all the peers were summoned, though the regulation of 7 W. III. was not introduced into Ireland till the year 1773; Lord Mountm. 2 vol. 197. Murder is high treason by the law of Ireland.—CH.

steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial (r). Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges (s), that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament, during its sitting, though no high steward be existing; or in the recess of parliament, by the court of King's Bench, the record being removed into that court.

*It has been a point of some controversy, whether the bishops have now a right to sit in the court of the lord high steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of king William, "all peers, who have a right to sit and vote in parliament:" but the expression had been much clearer, if it had been "all lords," and not "all peers;" for though bishops, on account of the baronies annexed to their bishoprics, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for, indeed, they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Hen. II. they are expressly excused, rather than excluded, from sitting and voting in trials, when they come to concern life or limb: "*episcopi, sicut cæteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem*" (7): and Becket's quarrel with the king hereupon was not on

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but not bishops,
who have no
right to be tried
there.

(r) State Trials, vol. iv. 214, 232-3.

(s) Fost. 139.

(7) Bishops, like other peers, ought to be present at trials with the peers, until they come to concern loss of life or of limb.

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account of the exception, (which was agreeable to the canon law,) but of the general rule, that compelled the bishops to attend at all. And the determination of the house of lords in the earl of Danby's case (*t*) which has ever since been adhered to, is consonant to these constitutions: "that the lords spiritual have a right to stay and sit in court in capital cases, till the court proceeds to the vote of guilty, or not guilty." It must be noted, that this resolution extends only to trials *in full parliament*: for to the court of the lord high steward (in which no vote can be given, but merely that of guilty or not guilty) no bishop, as such, ever was or could be summoned; and though the statute of king William *regulates the proceedings in that court, as well as in the courts of parliament, yet it never intended to new model or alter its constitution; and consequently does not give the lords spiritual any right in cases of blood which they had not before (*u*). And what makes their seclusion more reasonable, is, that they have no right to be tried themselves in the court of the lord high steward (*w*), and therefore surely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a seat in the house; as appears from the trial of popish lords, of lords under age, and (since the union) of the Scots nobility, though not in the number of the sixteen; and from the trials of females, such as the queen consort or dowager, and of all peeresses by birth; and peeresses by marriage also, unless they have, when dowagers disparaged themselves by taking a commoner to their second husband (8).

3. The court of King's Bench, the principal court of criminal jurisdiction,

3. The court of *King's Bench* (*x*), concerning the nature of which we partly inquired in the preceding book (*y*), was, we may remember, divided into a *crown* side and a *plea* side. And on the crown side, or crown-office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this court also indictments from all inferior courts may be removed by

(*t*) Lord's Journ. 15 May, 1679.

(*u*) Fost. 248.

(*w*) Bro. Abr. t. Trial, 142.

(*x*) 4 Inst. 70; 2 Hal. P. C. 2;

2 Hawk. P. C. 6.

(*y*) See vol. III. page 41.

(8) But peeresses by marriage cannot be said to be ennobled by blood; for, after the death of their husbands,

they have even a less estate in their nobility than bishops, it being only *durante viduitate*.—CH.

writ of *certiorari*, and tried either at bar, or at *nisi prius*, by a jury of the county out of which the indictment is brought (9). The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction (though the two former are of greater dignity) known to the laws of England. For which reason, by the coming of the court of King's Bench into any county, (as it was removed to Oxford on account of the sickness in 1665,) all former commissions of *oyer and terminer*, and general gaol delivery, are at once absorbed and determined *ipso facto*: in the same manner as by the old Gothic and Saxon *constitutions, "*jure vetusto obtinuit, quievisse omnia inferiora judicia, dicente jus rege* (z) (10) (11)."

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(z) Stiernhook, l. 1, c. 2.

(9) Informations filed in the court of King's Bench, and indictments removed there by *certiorari*, if not tried at the bar of the court, which rarely happens, are tried at the assizes by writ of *nisi prius*. On which occasions the judges of assize had, till very lately, no power to pass sentence upon the parties convicted before them, that power being confined to the court when sitting in banc at Westminster, before whom the parties so convicted were obliged to appear, upon notice, to receive judgment, often at very great inconvenience and expense. To remedy this evil, it was enacted by statute 1 W. IV. c. 70, § 9, that upon all trials for felonies or misdemeanors upon any record of the court of King's Bench, judgment may be pronounced during the assizes or sittings, as well upon the persons who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons shall be present in court or not, excepting when such prosecution shall be by information filed by leave of the court of King's Bench, or information filed by the attorney-general, wherein he shall pray that the judgment may be postponed; and the judgment pronounced shall be endorsed upon the record of *nisi prius*, and afterwards en-

tered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to shew cause why a new trial should not be had or the judgment amended. And the judge before whom the trial was had, may either issue an immediate warrant for committing the defendant in execution, or respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term; and if imprisonment shall be part of the sentence, may order the same to commence on the day the party shall be taken to prison.

(10) By ancient custom, all inferior jurisdictions ceased, when the king was sitting in judgment.

(11) The court of King's Bench has no authority or jurisdiction to interfere in the regulation and management of the gaols of the kingdom. Where a person guilty of a misdemeanor, and confined in a county gaol under sentence of that court, prayed to be allowed the same indulgences as prisoners confined for felony, the court refused to make any order upon the gaoler for that purpose; *Rex v. Carlile*, 1 D. & R. 535. The court of K. B. cannot grant

into which all that was good of the star-chamber jurisdiction has been removed.

Into this court of King's Bench hath reverted all that was good and salutary of the jurisdiction of the court of *star chamber, camera stellata* (a): which was a court of very an-

(a) This is said (Lamb. Arch. 154,) to have been so called, either from the Saxon word *ſtoepan* to *steer* or *govern*; or from its punishing the *crimen stellionatus*, or cozenage; or because the room wherein it sate, the old council-chamber of the palace of Westminster, (Lamb. 148,) which is now converted into the lottery-office, and forms the eastern side of New Palace Yard, was full of windows; or (to which sir Edward Coke, 4 Inst. 66, accedes) because *haply* the roof thereof was at the first garnished with gilded stars. As all these are merely conjectures (for no stars are now in the roof, nor any are said to have remained there so late as the reign of queen Elizabeth,) it may be allowable to propose another conjectural etymology, as plausible perhaps as any of them. It is well known that, before the banishment of the Jews under Edward I. their contracts and obligations were denominated in our ancient records *starra* or *starrs*, from a corruption of the Hebrew word, *shetar*, a covenant, (Tovey's Angl. judaic. 32. Selden. tit. of Hon. ii. 34. Uxor. Ebraic. i. 14.) These stars, by an ordinance of Richard the first, preserved by Hovedon, were commanded to be enrolled and deposited in chests

under three keys in certain places; one, and the most considerable, of which was in the king's exchequer at Westminster; and no starr was allowed to be valid, unless it were found in some of the said repositories. (Memorand. in Scacc. P. 6 Edw. I. prefixed to Maynard's Year-book of Edw. II. fol. 8. Madox. Hist. Exch. c. vii. § 4, 4, 5, 6.) The room at the exchequer, where the chests containing these starrs were kept, was probably called the *starr-chamber*; and, when the Jews were expelled the kingdom, was applied to the use of the king's council, sitting in their judicial capacity. To confirm this, the first time the star-chamber is mentioned in any record, it is said to have been situated near the receipt of the exchequer at Westminster: (the king's council, his chancellor, treasurer, justices, and other sages, were assembled *en la chaumbre des esteilles pres la resceipt al Westminster*. Claus. 41, Edw. III. m. 13.) For, in process of time, when the meaning of the Jewish *starrs* was forgotten, the word *star-chamber* was naturally rendered in law French, *la chaumbre des esteilles*, and in law Latin, *camera stellata*; which continued to be the style in Latin till the dissolution of that court (12).

a mandamus to the justices of sessions, to compel them to allow untried prisoners any other food than the ordinary gaol allowance; *Rex v. Yorkshire Justices*, 3 D. & R. 510; 2 B. & C. 286. The court of K. B. cannot grant a writ of habeas corpus to bring up a prisoner under criminal process in the House of Correction, for the purpose of his being charged in the custody of the marshal upon a bailable writ, and recommitted to his former custody, so charged; *Guthrie v. Ford*, 4 D. & R. 271. See post, 300. Offences committed out of England are not cognizable by the

court of K. B., unless there is a special Act of parliament for the purpose of giving them jurisdiction; *Rex v. Munton*, 1 Esp. 62. The court of K. B. will not mitigate a fine imposed by an inferior court, the record whereof is removed there by certiorari; *Rex v. Loveden*, 8 T. R. 615. The court of K. B. has no jurisdiction to review the judgment of a court of quarter sessions, unless there be a case sent up for their consideration; *Rex v. Carnarvon Justices*, 4 B. & A. 86. Where there is any evidence tending to prove an offence over which a magistrate has a summary

cient original (b), but new modelled by statutes 3 Hen. VII. c. 1, and 21 Hen. VIII. c. 20, consisting of divers lords spiritual and temporal, being privy counsellors, together with

(b) Lamb. Arch. 156.

jurisdiction by conviction, the court of K. B. cannot judge of the degree of it, or control the determination of the magistrate upon that evidence; *Rex v. Davis*, 6 T. R. 177. If justices acquit a defendant against whom an information is laid before them for a penalty, the court of K. B. cannot reverse the judgment; *Rex v. Reason*, 6 T. R. 375. But that court has a general jurisdiction over all acts contrary to good morals and public decency; *Jones v. Randall*, Loft, 383; which cannot be ousted but by express words or necessary implication; *Cates v. Knight*, 3 T. R. 442. If an indictment for felony has been removed into the court of K. B. from an inferior court, in order to issue process of outlawry upon it, and the party accused come in, the court will send the record back; *Rex v. Perry*, 5 T. R. 478. Where a prisoner was convicted of perjury in an inferior jurisdiction, and sentence of transportation was entered on the record informally, the court of K. B. on error brought, commanded the court below to pronounce the proper judgment; *Rex v. Kenworthy*, 3 D. & R. 173; 1 B. & C. 711.

The court of King's Bench has authority to order the sheriff of any county, or the marshal of the court, to carry into execution a sentence of death, pronounced by a judge under a commission of oyer and terminer and general gaol

delivery; *Rex v. Garside*, 4 Nev. & Man. 33.

The attorney general, upon motion, is entitled, as of course, to a *habeas corpus* and *certiorari* to bring up a prisoner and the record of his conviction in a case of felony; *Id. Ibid.*

In a case of a conviction for murder in which the prisoners were brought up by *habeas corpus*, and the record by *certiorari*, the court gave the prisoners three days' time to examine the record, and instruct counsel to shew cause why execution should not be awarded against them; *Id. Ibid.*

See further as to the jurisdiction of this court, with reference to the writ of *certiorari*, post, 320.

(12) In one of the statutes of the university of Cambridge, the antiquity of which is not known, the word *starrum* is twice used for a schedule or inventory. The statute is intitled, *De computatione procuratorum*, and it directs that *in fine computi fiat starrum per modum dividendæ, in quo ponentur omnia remanentia in communi cistâ tam pignora quam pecunia, ac etiam arreragia et debita, ita quod omnibus constare poterit evidenter, in quo statu tunc universitas fuerit quoad bona, &c.** Stat. Acad. Cant. p. 32. Such inventories would be made at the king's exchequer, and the room where they were deposited would probably be called the star-chamber.—CH.

* Concerning the accounts of the proctors:—at the end of the accounts there shall be made an *inventory* in the manner of a dividend, in which shall be comprised all things remaining in the common chest, as

well securities as money, and also all arrears and debts, so that it may be made evident to all persons in what state the university is with respect to property, &c.

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two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious *misdemeanors, contrary to the laws of the land. Yet this was afterwards, as lord Clarendon informs us (*c*), stretched “to the asserting of all proclamations, and orders of state: to the vindicating of illegal commissions, and grants of monopolies; holding for honourable that which pleased, and for just that which profited, and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treasury: the council-table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the star chamber, which consisted of the same persons in different rooms, censuring the breach and disobedience to those proclamations by very great fines, imprisonments, and corporal severities: so that any disrespect to any acts of state, or to the persons of statesmen, was in no time more penal, and the foundations of right never more in danger to be destroyed.” For which reason it was finally abolished by statute 16 Car. I. c. 10, to the general joy of the whole nation (*d*).

4. The court of chivalry, the authority of which has fallen into total disuse.

4. The court of *Chivalry* (*e*), of which we also formerly spoke (*f*), as a military court, or court of honour, when held before the earl marshal only, is also a criminal court, when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war,

(*c*) Hist. of Reb. book 1 and 3.

(*d*) The just odium into which this tribunal had fallen before its dissolution, has been the occasion that few memorials have reached us of its nature, jurisdiction, and practice; except such as, on account of their enormous oppression, are recorded in the histories of the times. There are, however, to be met with, some reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age, and some in manuscript; of which the author has two; one from 40 Eliz. to 13 Jac. I.

the other for the first three years of king Charles: and there is in the British Museum (Harl. MSS. vol. I. No. 1226) a very full, methodical, and accurate account, of the constitution and course of this court, compiled by William Hudson, of Gray's Inn, an eminent practitioner therein (13); and a short account of the same, with copies of all its process, may also be found in 18 Rym. Foed. 192, &c.

(*e*) 4 Inst. 123; 2 Hawk. P. C. 9.

(*f*) See vol. III. page 68.

(13) Hudson's Treatise of the Court of Star-Chamber is now published at

the beginning of the 2d vol. of Collectanea Juridica.—CH.

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as well out of the realm as within it. But the criminal, as well as civil part of its authority, is fallen into entire disuse: there having been no permanent high constable of England, but only *pro hac vice* at coronations and the like, since the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII.; the authority and charge, both in war and peace, being deemed too ample for a subject: so ample, that when the chief Justice Fineux was asked by king Henry the eighth, how far they extended, he declined answering: and said, the decision of that question belonged to the law of arms, and not to the law of England (g).

5. The high court of *Admiralty* (h), held before the lord high admiral of England, or his deputy, styled the judge of admiralty, is not only a court of civil, but also of criminal jurisdiction. This court hath cognizance of all crimes and offences committed either upon the sea, or on the coasts, out of the body or extent of any English county; and by statute 15 Ric. II. c. 3, of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens (14); such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction there was contrary to the genius of the law of England; inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment: for the rule of the civil law is, how reasonably I shall not at present inquire,

5. The court of Admiralty having jurisdiction over all offences committed at sea.

(g) Duck. de authorit. jur. civ.

(h) 4 Inst. 134, 147.

(14) The jurisdiction given to the court of Admiralty by the 15 R. II. c. 3, in cases of mayhem, &c., is only concurrent with that of the common law courts, 1 Hale, P. C. 16; and, it seems clear, that the court has no jurisdiction in rivers, or arms, or creeks of the sea, within the bodies of counties, though within the ebb and flow of the tide, except in the cases of homicide and mayhem mentioned in this statute. "Within the body of a county" has been construed to mean, when one, with the naked eye, can see from one side of a river, &c. to the other.

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that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offence to the English nation: and therefore in the eighth year of Henry VI. it was endeavoured to apply a *remedy in parliament: which then miscarried for want of the royal assent. However, by the statute 28 Hen. VIII. c. 15, it was enacted, that these offences should be tried by commissioners of *oyer* and *terminer*, under the king's great seal; namely, the admiral, or his deputy, and three or four more; among whom two common law judges are usually appointed; the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the course of proceedings should be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty: the judge of the admiralty still presiding therein, as the lord mayor is the president of the session of *oyer* and *terminer* in London (15).

(15) For some of the many other statutes relating to piracy, or "marine felonies," vide *ante*, 71 to 73, post, 305: the following seem more properly noticed here. By the 39 Geo. III. c. 37, all offences whatever committed on the high seas shall be liable to the same punishments as if committed on shore, and shall be tried and adjudged in the same manner as directed by 28 Hen. VIII. c. 15. By the 1 Geo. IV. c. 90, persons tried for murder or manslaughter committed at sea, shall receive the benefit of clergy, as if committed on land. By the 7 Geo. IV. c. 38, commissioners for trying offences at sea, or justices, may take examinations touching offences committed within the jurisdiction of the Admiralty, and commit the persons charged. By the 7 & 8 Geo. IV. c. 28, § 12, all offences prosecuted in the Admiralty court, shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land. By the 7 & 8 Geo. IV. c. 29,

§ 77, where any felony or misdemeanor punishable under that Act, shall be committed within the jurisdiction of the Admiralty, the same shall be dealt with, inquired of, tried, and determined, in the same manner as any other felony or misdemeanor committed within that jurisdiction: and the 7 & 8 Geo. IV. c. 30, § 43, contains a similar provision with reference to that Act. And by the 9 Geo. IV. c. 31, § 32, all indictable offences mentioned in that Act, which shall be committed within the jurisdiction of the Admiralty, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land, and may be dealt with, inquired of, tried, and determined in the same manner as any other offences committed within the jurisdiction of the Admiralty: proviso, not to alter or affect any of the laws relating to the government of the land or naval forces. By 4 & 5 W. IV. c. 36, intituled "An Act for establishing a new court for the trial of offences committed in the

These five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise through-

metropolis and parts adjoining," (commonly called "The Central Criminal Court Act"), § 22, "Whereas it is expedient that persons charged with certain offences committed on the high seas and other places within the jurisdiction of the admiralty of England should speedily be brought to trial: be it therefore enacted, That it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery to be named in and appointed by the commissions to be issued under the authority of this Act, or any two or more of them, to inquire of, hear and determine any offence or offences committed or alleged to have been committed on the high seas, and other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to or detained therein, for any offence or offences alleged to have been done and committed upon the high seas aforesaid within the jurisdiction of the admiralty of England: and all indictments found and trials and other proceedings had and taken by and before the said justices and judges of oyer and terminer and gaol delivery shall be valid and effectual to all intents and purposes whatsoever: and that it shall and may be lawful for any three of the said justices and judges of oyer and terminer and gaol delivery to order and direct the payment of the costs and expences of such prosecutions in manner prescribed and directed by the before-recited Act of the seventh of George the fourth:" (7 Geo. IV. c. 64).

The 28 Hen. VIII. c. 15, does not affect the jurisdiction of the Admiralty court, but only regulates the mode of trial; 1 Chit. C. L. 155; Com. Dig. *Admiralty*, (E.) 5. Neither that statute, nor the 39 Geo. III. c. 37, removes any jurisdiction over offences which might previously have been tried

in the common law courts. Thus, an information at common law for a conspiracy on the high seas, upon proof of an overt act on shore, is well triable in Middlesex; *Rex v. Brisac*, and *Rex v. Scott*, 4 East, 164. Where a pistol fired on shore kills a man at sea, the offence is properly triable at the Admiralty sessions, because the murder, by construction of law, is committed where the death occurs; *Rex v. Coombe*, 1 Leach, 388. But where, on the other hand, a man stricken on the high seas dies upon the shore, after the reflux of the water, the admiral has no cognizance of the felony; 2 Hale, P. C. 17. If a stroke is given at sea, and the party dies in Ireland, *quære*, where shall the murder be tried? *Rex v. Farrell*, 1 W. Bl. 456. Where several mariners on board a ship lying near the Groyne, seized the captain, he not agreeing with them, and, having put him on shore, carried away the ship, and afterwards committed several piracies; this force upon the captain, and the carrying away the ship, which was explained by the use of it afterwards, was adjudged piracy; *Rex v. May*, 2 East, P. C. 796; 2 Russell, 103. Where the offence is committed, not upon the high seas, but in a creek, &c., within the body of a county, and therefore not triable by the admiralty, it is not piracy; *Hide's case*, Molloy, 71. If the offence is committed in a creek, &c., in a foreign country, the court of Admiralty has jurisdiction over it, and consequently it is piracy; *Rex v. Jemott*, Archb. C. P. 152. A manslaughter committed in China by an alien enemy who had been a prisoner of war, and was then acting as a mariner on board an English merchant ship, on an Englishman, cannot be tried here under a commission issued in pursuance of 33 Hen. VIII. c. 23, and 43 Geo. III. c. 113, § 6; *Rex v. Depardo*, 1 Taunt.

out the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts. Of which species are—

26; R. & R. C. C. 134. The court of Admiralty has no jurisdiction to try an offence against the 11 Geo. I. c. 29, in procuring the destruction of a ship of which the prisoners were the owners, there being no evidence of any act of procurement done upon the high seas within the jurisdiction of the Admiralty; *Rex v. Easterby*, R. & R. C. C. 37. The commissioners under the 28 Hen. VIII. c. 15, are not restricted to places which are without the body of any county. When the haven, &c. is within the body of a county, the common law tribunals have also a concurrent jurisdiction; *Rex v. Bruce*, id. 243. Where the prisoner was capitally convicted at the Admiralty sessions for maliciously stabbing upon the 43 Geo. III. c. 58; it was held, that as the statute only made the offence capital if committed in England or Ireland, it was not so if committed at sea; *Rex v. Amarro*, id. 286. A prisoner was indicted at the Admiralty sessions for maliciously shooting; the offence was committed within a few weeks after the 39 Geo. III. c. 37 passed, and before notice of it could have reached the place where the offence was committed. The judges thought the prisoner could not have been tried if that statute had not passed; and, as he could not have known of it, recommended him for a pardon; *Rex v. Bailey*, id. 1. An indictment was found at the Admiralty sessions against prisoners for maliciously burning a ship, with intent to defraud the underwriters. This was made felony by the 22 & 23 Car. II. c. 11, § 12, and the indictment was on that statute. On conference, Holt, C. J., and Tracy J., thought this might be tried under the commission, and that the 28 Hen. VIII. c. 15, extended to the trial of an offence made felony

by a subsequent statute; but the other judges being of a different opinion, it was agreed that it was not proper to try the prisoner; *Rex v. Snape*, 1702; Tracy's MS. 78; 2 East, P. C. 807; but see 1 Ann. st. 2, c. 9, § 4; R. & R. C. C. 5, (a). Piratically stealing a ship's anchor and cable is a capital offence by the marine laws, and triable under the 28 Hen. VIII. c. 15, the 39 Geo. III. c. 37, not extending to such a case. And the stealing is equally an offence, though the master of the vessel concur in it, and though the object is to defraud the underwriters, not the owners; *Rex v. Curling*, id. 123; and see the notes, id. 124, 5. A British subject is indictable under the 33 Hen. VIII. c. 23, for the murder of another British subject, though the murder was committed within the dominion of a foreign state. Stating in the indictment that the person murdered was at the time in the king's peace, is sufficient to shew that he was a British subject. The conclusion in the indictment, that the offence was against the king's peace, shews sufficiently that the prisoner was a British subject. For a common law felony, committed abroad, but triable here under the 33 Hen. VIII. c. 23, the indictment need not conclude *contra formam statuti*; *Rex v. Sawyer*, id. 294. Making, or endeavouring to make a revolt, with a view to procure a redress of grievances, and without any intent to run away with the ship, or to commit any act of piracy, is an offence within the 11 & 12 W. III. c. 7, § 9; *Rex v. Hastings*, R. & M. C. C. 82. For the form of the commission of oyer and terminer for the Admiralty of England, see 4 Chit. C. L. 160, 170. By the 32 Geo. II. c. 25, § 20, an Admiralty session, must be held at least twice every year. By

6. 7. The courts of *oyer and terminer*, and general *gaol delivery* (i): which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times (16). These were slightly mentioned in the preceding

6, 7. The courts of oyer and terminer, and general gaol delivery, held before the king's commissioners at stated intervals in every county of the kingdom.

(i) 4 Inst. 162, 168; 2 Hal. P. C. 22, 32; 2 Hawk P. C. 14, 23.

the 7 Geo. IV. c. 64, § 27, in prosecutions in the Admiralty courts, the court may order expenses in all charges of felony or misdemeanor, where they may be allowed by other courts, to be paid by the assistant to the counsel to the Admiralty; vide *post*, 295.

(16) In London they are now held twelve times in the year, under the authority of a new and most important statute, 4 & 5 W. IV. c. 36, commonly called "The Central Criminal Court Act."

By sect. 1 of that statute, the lord mayor of London, the lord chancellor, the judges, the aldermen, recorder, common serjeant, and judges of the Sheriff's Courts of London, and such others as his Majesty may appoint, are to be the judges of a court to be called "The Central Criminal Court."

By sect. 2, his Majesty may issue commissions of oyer and terminer and gaol delivery for the trial at such court, of all offences committed in London and Middlesex, and in certain parts of Essex, Kent, and Surrey.

By sect. 3, such new district is to be considered as one county, and the venue in all indictments, &c., is to be "Central Criminal Court, to wit."

By sect. 4, juries may be summoned from London, or from the counties, or from both indiscriminately, to try all offences cognizable by the Act.

By sect. 5, his Majesty, by order in council, may appoint the places of confinement for prisoners.

By sect. 6, the Penitentiary at Millbank shall be one of the prisons under the Act.

By sect. 7, persons sentenced to imprisonment for offences committed beyond the limits of this Act, may be removed to the Penitentiary at Millbank.

By sect. 8, all regulations for the management of the Penitentiary at Millbank, shall apply to prisoners confined there under the authority of this Act.

By sect. 9, persons convicted may be imprisoned either in the county gaols or in Newgate: and the sheriffs of London may execute judgments.

By sect. 10, justices and coroners in Essex and Kent shall commit offenders to Newgate, and justices and coroners in Surrey shall commit offenders to Horsemonger-lane.

By sect. 11, justices and coroners shall specify in their commitments that persons are committed under this act, and shall take examinations, &c., as required by 7 Geo. IV. c. 64. This section also gives power to the sheriff of Surrey to remove prisoners from the gaol of that county to Newgate for trial.

By sect. 12, the judges may order payment by the treasurers of the counties of expenses to prosecutors and witnesses; and such treasurers, or their agents, shall attend the court to make such payments.

By sect. 13, no indictment for a misdemeanor except perjury or subornation of perjury, shall be presented to the grand jury, unless the prosecutor shall have been bound over by recognizance to prosecute.

By sect. 14, the court of lord mayor and aldermen of London may contract with the justices of Essex, Kent, and

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book (*k*). We then observed, that, at what is usually called the assizes, the judges sit by virtue of five several authorities; two of which, the commission of *assize* and its attendant jurisdiction of *nisi prius*, being principally of a civil nature, were then explained at large; to which I shall only add that these justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases (*l*). The third, which is the *commission of the *peace*, was also treated of in a former volume (*m*), when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the assizes are held, are bound by law to attend them, or else are liable

(*k*) See vol. III. page 60.

(*m*) See vol. I. page 351.

(*l*) 2 Hal. P. C. 39; 2 Hawk. P. C. 28.

Surrey, for the support of their prisoners in Newgate: and if they cannot agree, the judges shall settle the amount.

By sect. 15, sessions are to be held in London, or the suburbs thereof, twelve times in every year, at the least.

By sect. 16, indictments found at the sessions of the peace may be removed before the justices of oyer and terminer and gaol delivery.

By sect. 17, justices at quarter sessions are restrained from trying certain specified offences.

By sect. 18, recognizances for prosecuting, giving evidence, &c. before sessions of the peace, shall be obligatory on persons entering into the same to prosecute, give evidence, &c. before the justices of oyer and terminer and gaol delivery: notice being given to the parties of the change of court.

By sect. 19, justices of peace may deliver over indictments found at sessions to the justices of oyer and terminer and gaol delivery.

By sect. 20, the judges of the court shall settle the fees or salaries of the officers, and direct how the same shall be paid.

By sect. 21, justices of the peace shall not be prevented by the sessions holden under this Act, from holding their own respective sessions.

By sect. 22, the court is authorized to try offences committed upon the high seas. Vide *ante*, 268, n. (15).

Sect. 23, saves the rights and privileges of the city of London.

The judges of the Central Criminal Court, after postponement till the next session, on motion for the prosecution, of the presentation of a bill for a capital offence, refused, on motion for the prisoner, to read over very long depositions, to enable them to decide whether they would admit him to bail, although the application was made on the ground that there was not sufficient time to prepare proper affidavits before the breaking up of the court; *Rex v. Palmer*, 6 C. & P. 654.

On bills found in this court for misdemeanors, forty-eight hours' notice of bail is necessary, unless the application is made on a Friday with a view of detaining the party in custody over Sunday; *Rex v. Carlile*, 6 C. & P. 628.

The binding over to prosecute, which is necessary to give the grand jury of the Central Criminal Court jurisdiction in certain cases of misdemeanor, under § 13 of 4 & 5 W. IV. c. 36, must take place before a magistrate, previous to the session of the court, and cannot be done by the court itself; *Rex v. Carlton*, 6 C. & P. 651.

to a fine; in order to return recognizances, &c. and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the commission of *oyer and terminer* (n), to hear and determine all treasons, felonies, and misdemeanors. This is directed to the judges and several others, or any two of them (17); but the judges (18) or serjeants at law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine:" so that by virtue of this commission they can only proceed upon an indictment found at the same assizes; for they must first inquire, by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury (19). Therefore they have besides, fifthly, a commission of general *gaol delivery* (o), which empowers them to try and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed. It was anciently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo* (p): but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their

(n) See Appendix, § 1.

(p) 2 Inst. 43.

(o) *Ib.*

(17) It is under the great seal, and directed to the chancellor, president of the council, lord president of the council, lord privy seal, several noblemen, two judges of the courts at Westminster, king's counsel, serjeants and associates. There must be four of the persons named in the commission present; 2 Hale, P. C. 23; 1 Saund. 249 (a).

(18) King's counsel are included.

(19) The commission of oyer and terminer authorizes the persons to whom it is directed, or three or four of them, to inquire of all treasons, felonies and misdemeanors therein specially mentioned, and of all others in certain counties, and to hear and determine the same at certain days and places to

be appointed by them. For which purpose the king acquaints them that he has sent a writ to the sheriffs of such counties, commanding them to return a jury before them, at such days and places as shall be notified by them, in order to make inquiry of such offences; 2 Hawk. P. C. c. 5, § 22. Under this commission persons may be tried whether they be in gaol, or at large, 1 Chit. C. L. 144; and it seems agreed that where a statute prohibits any thing, and does not appoint in what court it shall be punished, the offender may be indicted before justices of oyer and terminer, because the king may sue in that court which he prefers; *Id.* 2; Hawk. P. C. c. 5, § 33.

stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year: a constitution of singular use and excellence (20). Sometimes also, upon urgent occasions, the king issues a special or extraordinary commission of *oyer and ter-*

(20) The commission of general goal delivery is directed only to the judges themselves, the serjeants, king's counsel, and the clerk of the assize and associate. It is a patent in the nature of a letter from the king to certain persons, constituting them his justices, and commanding them, four, three, or two of them, of which number there must be one at least of the judges and serjeants specified, and authorizing them to deliver his gaol at a particular town of the prisoners in it; for which purpose it commands them to meet at such place, at the time which they shall appoint, and informs them that, for the same purpose, the king has commanded his sheriff of the same county to bring all the prisoners of the gaol and their attachments before them, at the time they shall appoint, pursuant to the discretion given them; 1 Chit. C. L. 145; 2 Hawk. P. C. c. 6, § 1. Under this commission the justices may proceed upon any indictment of felony or trespass, found before other justices, against any person in the prison mentioned in their commission, and not determined; in which respect their authority differs from that of justices of oyer and terminer, who regularly can proceed only upon indictments found before themselves; 2 Hale P. C. 32; 2 Hawk. P. C. c. 6, § 2. Or they may take an indictment found originally before themselves; 2 Hale, P. C. 34; 2 Hawk. P. C. c. 6, § 3. And they have power to discharge not only prisoners acquitted, but also those against whom, upon proclamation made, no evidence shall appear to indict them, which neither justices of oyer and terminer, nor justices of the peace, can do; 2 Hale, P. C. 34; 2 Hawk. P. C. c. 6,

s. 6; 1 Chit. C. L. 146. See 14 G. III. c. 20, which enacts, that prisoners charged with felony, &c., before any court holding criminal jurisdiction in England and Wales, against whom no indictment shall be found, or who, on trial, shall be acquitted, or who shall be discharged by proclamation, for want of prosecution, shall be immediately set at large, without payment of any fee. It appears from the language of this commission, that justices of gaol delivery cannot, except in some special cases, try any persons who are not in the actual or constructive custody of the person specifically mentioned in the commission; 2 Hawk. P. C. c. 6, s. 5. But a person admitted to bail is in constructive custody; 2 Hale, P. C. 34, 35. The commissions of gaol delivery are the same on all the circuits. Unlike the commission of oyer and terminer, in which the same authority suffices for every county, there is a distinct commission to deliver each particular gaol of the prisoners under the care of its keeper; 1 Chit. C. L. 146. For the forms of both these commissions, see 4 Chit. C. L. By the 3 G. IV. c. 10, entitled, "An Act to enable, in certain cases, the opening and reading of commissions under which the judges sit upon the circuits, after the day appointed for holding the assizes," it is enacted, that when commissions shall not be opened at any place specified on the day named therein, the same may be opened and read on the following day, not being Sunday; and that where commissions are opened pursuant to the provisions of that Act, the cause of delay shall be certified to the lord chancellor, and enrolled.

miner, and *gaol delivery*, confined to those offences which stand in need of immediate inquiry and punishment: upon which the course of proceeding is much the same, as upon general and ordinary commissions. Formerly it was held, in *pursuance of the statutes 8 Ric. II. c. 2, and 33 Hen. VIII. c. 4, that no judge or other lawyer could act in the commission of *oyer* and *terminer*, or in that of *gaol delivery*, within his own county, where he was born or inhabited; in like manner as they are prohibited from being judges of assize and determining civil causes. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper by the statute 12 Geo. II. c. 27, to allow any man to be a justice of *oyer* and *terminer* and general *gaol delivery* within any county of England.

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8. The court of general *quarter sessions* of the peace (*q*) is a court that must be held in every county once in every quarter of a year; which by statute 2 Hen. V. c. 4, is appointed to be in the first week after Michaelmas-day (21); the first week after the Epiphany; the first week after the close of Easter; and in the week after the translation of St. Thomas the martyr, on the seventh of July (22). It is

8. The court of quarter sessions, the jurisdiction of which is in practice limited to clergyable felonies;

(*q*) 4 Inst. 170; 2 Hal. P. C. 42; 2 Hawk. P. C. 32.

(21) By statute 54 G. III. c. 84, the quarter sessions for the Michaelmas quarter is appointed to be holden in every county, &c., except London and Middlesex, in the first week after the 11th of October, in every year, instead of the time appointed by the former Act of Parliament; but the Act is merely directory, and those sessions may, notwithstanding that enactment, be legally holden at another time; *Rex v. Js.*, of Leicester, 7 B. & C. 6; 9 D. & R. 772. And see 1 W. IV. c. 70, s. 35, which, reciting that it will be expedient that the times of holding the *general quarter sessions* of the peace should be altered in part, enacts, that after the year 1831, such sessions shall be held

in the first week after the 11th of October, in the first week after the 28th of December, in the first week after the 31st of March, and in the first week after the 24th of June. See also the next note.

(22) The 2 Hen. V. c. 4, after appointing the periods for holding the sessions as mentioned in the text, adds the words, "and more often, if need be." Mr. Collyer, in his collection of criminal statutes, 280, n., says, "It is laid down by high authorities that these words give power to the justices to hold a general session whenever they please; 2 Hale, P. C. 49; 2 Hawk. P. C. c. 8, § 47; 1 Chit. C. L. 134. The point, however, seems doubtful: see 5 Burn.

held before two or more justices of the peace, one of which must be of the *quorum*. The jurisdiction of this court, by statute 34 Edw. III. c. 1, extends to the trying and determining all felonies and trespasses whatsoever: though they seldom, if ever, try any greater offence than small felonies within the benefit of clergy; their commission providing, that, if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the courts of King's Bench or Common Pleas, or one of the judges of assize. And therefore murders, and other capital felonies, are usually remitted for a more solemn trial to the assizes (23). They cannot also try any new-created offence,

204, n., and see *Lambard's Justice*." It is, with deference, apprehended, that there is no doubt upon the point. The power has for some time past been exercised in the counties of Stafford, Surrey, Suffolk, and Norfolk; and recently, in the counties of Devon and Essex; under the sanction of very high legal authorities, and with the approbation of the ministers of the crown. The language of the statute seems not only to permit, but even to require, an increase of the number of the sessions, where circumstances render it desirable; for, "words of permission in an Act of Parliament, if tending to promote the public good, are always held to be compulsory." *Per Curiam*, in *Rex v. the Mayor of Hastings*, 1 D. & R. 149; 5 B. & A. 692, n.; and see *Rex v. Havering*, 5 B. & A. 691; 2 D. & R. 176, n. At least the statute gives the justices a discretion, which could not have been intended as a nullity; and a nullity it clearly becomes, if they have not the power alluded to. See the last note.

(23) The court of general quarter sessions of the peace, as far as respects its jurisdiction to hear and determine indictments, appears to owe its origin to the statutes 18 Edw. III. c. 2, and 34 Edw. III. c. 1. From the latter statute the conservators of the peace derived at once the title of justices, and the power to try felonies. It appears by the language of these statutes, and

of their commission, that justices of the peace have now no jurisdiction in cases of treason. Anciently they had the power, under certain statutes, of hearing and determining certain kinds of treason; and they may still, perhaps, have jurisdiction over the offence of clipping coin, as it seems doubtful whether the 3 Hen. V. c. 7, is repealed: see 2 Hawk. P. C. 55, where Mr. Curwood recognizes that statute as still existing. Justices of the peace have jurisdiction over cases of murder and manslaughter; 2 Hale, P. C. 45; although they never exercise it, on account of the caution in their commission, "that if a case of difficulty shall arise, they shall not proceed to give judgment except in the presence of some justice of one of the benches, or of assize;" see 4 Chit. C. L.; 2 Hawk. P. C. c. 8, § 9; 2 Hale, P. C. 42, 43. Upon the trial of an indictment at the quarter sessions, that court is the sole judge of the propriety of the entry of the verdict. Where, therefore, upon a special finding by the jury, amounting to an acquittal, the chairman directs a verdict of "guilty" to be entered, the court of K. B. will not grant a mandamus requiring the minute of the verdict to be altered according to the fact. The only course open to the prisoner is to apply to the crown for a pardon; *Rex v. Justices of Suffolk*, 5 Nev. & Man. 139.

without express power given them by the statute which creates it (*r*). But there are many offences, and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as, the *smaller misdemeanors, against the public, or commonwealth, not amounting to felony; and especially offences relating to the game, highways, alehouses, bastard children, the settlement and provision for the poor, vagrants, servants' wages, apprentices, and popish recusants (*s*) (24). Some of these are proceeded upon by indictment, and others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the court of King's Bench, by writ of *certiorari facias*, and be there either quashed or confirmed (25). The records or rolls of the sessions are committed to the custody of a special officer denominated the *custos rotulorum*, who is always a justice of the *quorum*; and among them of the *quorum*, saith Lambard (*t*), a man for the most part especially picked out either for wisdom, countenance, or credit. The nomination of the *custos rotulorum*, (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command,) is by the king's sign manual: and to him the nomination of the clerk of the peace belongs; which office he is expressly forbidden to sell for money (*u*) (26).

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(*r*) 4 Mod. 379; Salk. 406; Lord Raym. 1144.

(*s*) See Lambard Eirenarcha, and Burn's Justice.

(*t*) B. 4, c. 3.

(*u*) Stat. 37 Hen. VIII. c. 1; 1 W. & M. st. 1, c. 21.

(24) The word "trespasses," in the 34 Edw. III. c. 1, and in the commission of the justices, comprehends not only all direct breaches of the peace, as assaults, batteries, &c., but also all offences that have a tendency thereto. Thus it has been held that soliciting a servant to steal his master's goods is a misdemeanor indictable at the sessions, as having a tendency to a breach of the peace; *Rex v. Higgins*, 2 East, 5. So the sessions have jurisdiction over cheats in general; *Rex v. Brayne*, and *Rex v. Beale*, 1 East, 183, n. And over conspiracies; *Rex v. Rispal*, 1 W. Bl. 368;

3 Burr. 1320. But they have no jurisdiction over the offence of forgery at common law; *Rex v. Gibbs*, 1 East, 173; nor of usury, or perjury; *Rex v. Rispal*, 1 W. Bl. 368; 3 Burr. 1320; because these offences do not savour of open violence; 2 Hawk. P. C. c. 8, § 64. These exceptions, however, are now considered to rest more upon authority than principle; 1 Chit. C. L. 139.

(25) Vide *post*, 320, in notis, where the subject is fully discussed.

(26) If the clerk of the peace misdemeanors himself, the justices of peace

In most corporation towns there are quarter sessions kept before justices of their own, within their respective limits: which have exactly the same authority as the general quarter sessions of the county, except in a very few instances; one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county, by statute 8 and 9 W. III. c. 30 (27). In both corporations and counties at large, there is sometimes kept a special or petty session, by a few justices, for despatching smaller business in the neighbourhood between the times of the general sessions; as, for licensing alehouses, passing the accounts of the parish-officers, and the like.

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9. The sheriff's tourn, a court of record, and the great court-leet of the county, out of which was taken;

9. *The *sheriff's tourn* (*u*), or rotation, is a court of record, held twice every year within a month after Easter and Michaelmas, before the sheriff, in different parts of the county; being indeed only the turn of the sheriff to keep a court-leet in each respective hundred (*w*): this therefore is the great court-leet of the county, as the county court is the court-baron: for out of this, for the ease of the sheriff, was taken;

10. The court-leet, also a court of record, held annually; the business of both these has chiefly devolved upon the quarter sessions;

10. The *court-leet*, or *view of frankpledge* (*x*), which is a court of record, held once in the year and not oftener (*y*), within a particular hundred, lordship, or manor, before the steward of the leet: being the king's court granted by charter

(*u*) 4 Inst. 259; 2 Hal. P. C. 69;
2 Hawk. P. C. 55.

(*x*) 4 Inst. 261; 2 Hawk. P. C. 72.

(*y*) Mirror, c. 1, § 10.

(*w*) Mirr. c. 1, § 13 & 16.

in quarter sessions have power to discharge him; and the *custos rotulorum* is to choose another, resident in the county, or, on his default, the sessions may appoint one: the place is not to be sold, on pain of forfeiting double the value of the sum given by each party, and disability to enjoy their respective offices; 1 W. & M. st. 1, c. 21, § 6.

(27) By sect. 8 of this statute, the right is reserved to the liberty of St. Alban's to hear and determine appeals for the settlement of the poor in their own quarter sessions, as they might have done before the passing of the

Act; and by the 9 Geo. I. c. 7, § 7, a like power is restored to the borough of St. Peter, and hundred of Nassaborough, in the county of Northampton. See upon this subject, the cases of *Rex v. East Donyland*, Burr. S. C. 592; *Rex v. Wendover*, 2 Bott. 722; 2 Salk. 590; *Rex v. Maldon*, Sett. & Rem. 10; and *Rex v. Carmarthen*, 4 B. & A. 293.

But see now upon this subject the recent and important statute, 5 & 6 W. IV. c. 76, the Municipal Corporation Reform Bill, too long even for an abridged insertion here.

to the lords of those hundreds or manors. Its original intent was to view the frankpledges, that is, the freemen within the liberty; who, we may remember (z), according to the institution of the great Alfred, were all mutually pledges for the good behaviour of each other. Besides this, the preservation of the peace, and the chastisement of divers minute offences against the public good, are the objects both of the court leet and the sheriff's tourn: which have exactly the same jurisdiction, one being only a larger species of the other; extending over more territory, but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant therein; which commorancy consists in usually lying there: a regulation, which owes its original to the laws of king Canute (a). But persons under twelve and above sixty years old, peers, clergymen, women, and the king's tenants in ancient demesne, are excused from attendance there: all others being bound to appear upon the jury, if required, and make their due presentments (28). It was also anciently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to *come to the court-leet, and there take the oath of allegiance to the king. The other general business of the leet and tourn, was to present by jury all crimes whatsoever that happened within their jurisdiction; and not only to present, but also to punish, all trivial misdemeanors (29), as

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(z) See vol. III. page 113.

(a) Part 2, c. 19.

(28) An immemorial custom for the steward of a manor to nominate the jury to serve on the court-leet, at the election of the mayor of a borough is good in law; *Rex v. Jolliffe*, 3 D. & R. 240; 2 B. & C. 54.

(29) It has been decided that the offence of selling a loaf of bread short of weight, is not within the jurisdiction of a court-leet; *Colebrook v. Elliott*, 3 Burr. 1859. An amercement at a court-leet for a private injury to the lord, is illegal, though there be a custom to warrant it; *Wood v. Lovatt*, 6 T. R. 511. A custom to swear the jurors at one court-leet to inquire, and to return their presentments at the next

court, is bad in law; *Davidson v. Moscrop*, 2 East, 56. A court baron cannot be legally held without two free suitors; *Rumsey v. Walton*, 4 T. R. 446, n.; and see *Holroyd v. Breare*, 2 B. & A. 473. A grant by royal charter empowered the steward and suitors of a manor to hold a court for the determination of civil suits, and there had been a non-user of the court for fifty years (except for the purpose of levying fines and suffering recoveries): it was held that the court being established for the public benefit, the words of permission in the charter were obligatory, and that the right of determining suits was not lost by the non-

all trivial debts were recoverable in the court-baron, and county court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our ancient constitution. Thus in the Gothic constitution, the *hæreda*, which answered to our court-leet, "*de omnibus quidem cognoscit, non tamen de omnibus judicat* (b) (30)." The objects of their jurisdiction are therefore unavoidably very numerous: being such as in some degree, either less or more, affect the public weal, or good governance of the district in which they arise; from common nuisances and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way: a circumstance, owing in part to the discharge granted by the statute of Marlbridge, 52 Hen. III. c. 10, to all prelates, peers, and clergymen from their attendance upon these courts: which occasioned them to grow into disrepute. And hence it is that their business hath for the most part gradually devolved upon the quarter sessions: which it is particularly directed to do in some cases by statute 1 Ed. IV. c. 2 (31).

11. The coron-
ner's court, also
a court of re-
cord;

11. The court of the *coroner* (c) is also a court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do *super visum corporis*. Of the coroner and his office we treated at large in a former

(b) Stiernh. de jur. Goth. l. 1, c. 2. (c) 4 Inst. 271; 2 Hal. P. C. 53;
2 Hawk. P. C. 42.

user; *Rex v. Havering-atte-Bower*, 2 D. & R. 176; 5 B. & A. 691; and see *Rex v. Hastings*, 1 D. & R. 148; 5 B. & A. 692, n. The bailiff and burgesses of an ancient borough had from time immemorial been lords of the manor, and owners of the guildhall within the borough; and, by a charter of 2 Philip & Mary, power was granted to them to hold manor courts in the guildhall twice in every year, "as of ancient time had been used;" and until 1810, such courts had been immemorially held. In that year commissioners under an inclosure

Act awarded to Lord H. all the said manor, with the rights, members, courts, view of frank-pledge, &c., excepting to the bailiffs and burgesses the guildhall, &c.: held, that this exception did not exclude the new lord's right to hold his manor courts in the guildhall; *Rex v. Ilchester*, 4 D. & R. 324; 2 B. & C. 764; and see S. C. 2 D. & R. 724.

(30) Takes cognizance of all, but does not adjudicate upon all offences.

(31) See fully upon the whole of this subject, Com. Dig. *Leet*; Jacob's Law. Dict. *Court Leet, Tourn.*

volume (*d*), among the public officers and ministers of the kingdom; and therefore shall not here repeat our inquiries: only mentioning his court, by way of regularity, among the criminal courts of the nation (32).

12. The court of the *clerk of the market* (*e*) is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of *pie poudre* is, to determine all disputes relative to private or civil property. The object of this jurisdiction (*f*) is principally the recognizance of weights and measures (33), to try whether they be according to the true standard thereof, or no: which standard was anciently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly: and hence this officer, though now usually a layman, is called the *clerk of the market* (*g*). If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom; though the objects of its coercion were esteemed among the Romans of such importance to the public, that they were committed to the care of some of their most dignified magistrates, the *curule ædiles*.

II. There are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction; extending only to some particular places which the royal favour, confirmed by Act of Parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemeanors arising within the bounds of their cognizance. These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

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12. The court of the clerk of the market; incidental only to fairs and markets; the lowest criminal court in the kingdom.

II. Criminal courts of a private and special jurisdiction, are

(*d*) See vol. I. page 349.

22 Car. II. c. 8; 23 Car. II. c. 12.

(*e*) 4 Inst. 273.

(*g*) Bacon of English Gov. b. 1, c. 8.

(*f*) See stat. 17 Car. II. c. 19;

(32) For the history of the coroner's court, see Jervis on the Office and Duty of Coroners, cap. 9; and with respect to the office and duty of coroners, see that work throughout. And for the leading decisions upon the subject, see

1 Harrison's Digest, 833, 834.

(33) Upon the subject of weights and measures, vide *ante*, 157, notes (9) and (10), where the existing law relative to those matters is fully detailed.

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I speak not here of ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animæ*; or, which is looked upon as equivalent to all the rest, by a sum of *money to the officers of the court by way of commutation of penance. Of these we discoursed sufficiently in the preceding book (*h*). I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable barterings of public justice.

1. The court of the lord steward instituted by 3 H. VII.

1. And, first, the court of the *lord steward, treasurer, or comptroller* of the king's *household* (*i*), was instituted by statute 3 Hen. VII. c. 14, to inquire of felony by any of the king's sworn servants, in the cheque roll of the household, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king, or any lord or other of his Majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The inquiry, and trial thereupon, must be by a jury according to the course of the common law, consisting of twelve sad men, that is, sober and discreet persons, of the king's household.

2. The court of the lord steward instituted by 33 Hen. VIII.;

2. The court of the *lord steward* of the king's *household*, or, in his absence, of the treasurer, comptroller, and steward of the *marshalsea* (*k*), was erected by statute 33 Hen. VIII. c. 12, with a jurisdiction to inquire of, hear, and determine, all treasons, misprisions of treason, murders, manslaughter, bloodshed, and other malicious strikings; whereby blood shall be shed in, or within the limits, that is, within two hundred feet from the gate, of any of the palaces and houses of the king, or any other house where the royal person shall abide. The proceedings are also by jury, both a grand and a petit one, as at common law, taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, are very minutely set forth in the said statute 33 Hen. VIII., and the several officers of the servants of the household in and about such execution are *described; from the serjeant of the wood-yard, who furnishes the

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(*h*) See vol. III. page 61.

(*k*) 4 Inst. 133; 2 Hal. P. C. 7.

(*i*) 4 Inst. 133.

chopping-block, to the serjeant farrier, who brings hot irons, to sear the stump (34).

3. As in the preceding book (*l*) we mentioned the courts of the two universities, or their chancellor's courts, for the redress of civil injuries; it will not be improper now to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford, (with which university the author hath been chiefly conversant, though probably that of Cambridge hath also a similar jurisdiction,) hath authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offences or misdmesnors under the degree of treason, felony, or mayhem. The prohibition of meddling with freehold still continues: but the trial of treason, felony, and mayhem, by a particular charter is committed to the university jurisdiction in another court, namely, the court of the *lord high steward* of the university.

For by the charter of 7 Jun. 2 Hen. IV., confirmed among the rest, by the statute 13 Eliz. c. 29, cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, felony, and mayhem, which shall be found in any of the king's courts against a scholar or privileged person (35); and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But, when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission under the great seal is given to him, and others, to try the indictment then depending, according to the law of the land and the privileges of the said university. When therefore an indictment is found *at the assizes, or elsewhere,

which have cognizance of all indictments against scholars, &c.;

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(*l*) See vol. III. page 83.

(34) The 3 Hen. VII. c. 14, is wholly repealed by the 9 Geo. IV. c. 31, as is also the 33 Hen. VIII. c. 12, part of § 6 to § 18, relating to this subject. The two courts mentioned in the text may now, therefore, be considered as no longer existing. They had for many years been utterly disused.

(35) A college barber at Oxford,

though he resides out of college in the city, is entitled to the privileges of the university; *Rex v. Routledge*, 2 Doug. 531. So is a marshal of the university, living in the suburbs; *Thornton v. Ford*, 15 East, 634. But independent members of a college are mere boarders, and have no corporate rights; *Rex v. Guendon*, Cowp. 319. And see the next note.

against any scholar of the university, or other privileged person, the vice-chancellor may claim the cognizance of it; and when claimed in due time and manner, it ought to be allowed him by the judges of assize: and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed: for I take it that the high steward cannot proceed originally *ad inquirendum*; but only, after inquest in the common law courts, *ad audiendum et determinandum* (36). Much in the

(36) As to the *time* at which the claim of cognizance is to be made, see *Rea v. Agar*, 5 Burr. 2820, where Lord Mansfield is reported to have said, "the established rule of law is, that cognizance must be claimed in the first instance, or at the first day." As to the *mode* in which the claim of cognizance is to be made, see *Kendrick v. Kynaston*, 1 Bla. Rep. 454. In *Hayes v. Long*, 2 Wils. 310, a claim of cognizance was refused to the university of Oxford, because the party, although a member, was not resident. In *Leasingby v. Smith*, 2 Wils. 406, a claim of cognizance was refused to the same university, because it was neither claimed in due form, nor in due time. In the report of that case, to which the student is referred, much curious and interesting information upon this subject is to be found.

Claim of cognizance by the university of Oxford was allowed in an action of trespass against a proctor, a pro-proctor, and the marshal of the university, though the affidavit of the latter, describing him as of a parish in the suburbs of Oxford, only verified that he was then, and had been for fourteen years, a common servant of the university, called marshal, and that he was sued for an act done by him in discharge of his duty, and in obedience to the orders of the other two defendants, without stating that he resided in the university, or was matriculated; *Thornton v. Ford*, 15 East, 634. Cognizance of a plea of trespass sued against a resident member of the university of Cambridge,

for a cause of action verified by affidavit to have arisen within the town and suburbs of Cambridge, over which the university court had jurisdiction, was allowed upon the claim of the vice-chancellor, on behalf of the chancellor, masters, and scholars of the university, entered on the roll in due form, setting out their jurisdiction under charters confirmed by act of parliament, and averring that the cause of action arose within such jurisdiction; *Brown v. Renourd*, 12 East, 12. A claim of cognizance made by the vice-chancellor of the university of Oxford, in the vacancy of the office of chancellor by death, on behalf of the university, was allowed in a plea of trespass; *Williams v. Brickenden*, 11 East, 543. A member of the university of Oxford cannot be arrested by civil process out of the court of the chancellor of the university, unless such process issues in a suit commenced against him while resident within the precincts of the university; *Perrin v. West*, 5 Nev. & Man. 291. Upon the return to a *habeas corpus cum causa* to remove the body of a defendant, in custody under a warrant of the chancellor of the university of Oxford, the defendant will be discharged, unless it appears distinctly, and not merely by inference, that he was resident within the jurisdiction of the chancellor's courts at the commencement of the suit; *Id. Ibid.* Whether a defendant can be arrested out of the precincts of the university of Oxford, upon the warrant of the chancellor, *quare*; *Id. Ibid.*

same manner, as when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes, or in the court of King's Bench, and then, in consequence of a writ of *certiorari*, transmitted to be finally heard and determined before his grace the lord high steward and the peers.

When the cognizance is so allowed, if the offence be *inter minora crimina*, or a misdemeanour only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this: The high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedels of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes*:" and by a jury formed *de medietate*, half of freeholders and half of matriculated persons, is the indictment to be tried; and that in the Guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty, the sheriff of the county must execute the university process; to which he is annually bound by an oath.

I have been the more minute in describing these proceedings, as there has happily been no occasion to reduce them into practice for more than a century past; nor will it perhaps ever be thought advisable to revive them: though it is not a right that merely rests *in scriptis* or theory, but has formerly often been carried into execution. There are many instances, one in the reign of queen Elizabeth, two in that of James the first, and two in that of Charles the first, where indictments for murder have been challenged by the vice-chancellor at the assizes, and afterwards tried before the high steward by jury. The commissions under the great seal, the sheriff's and bedel's panels, and all the other proceedings on the trial of the several indictments, are still extant in the archives of that university.

the trial is by
a jury de me-
dietate;

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these courts
have been dis-
used since the
reign of Car. I.

CHAPTER XX.

OF SUMMARY CONVICTIONS.

The proceedings in criminal courts are, *summary*, and *regular*.

WE are next, according to the plan I have laid down, to take into consideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offences. These are plain, easy, and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty, and the safety of the subject are more immediately brought into jeopardy. And these proceedings are divisible into two kinds; *summary*, and *regular*: of the former of which I shall briefly speak, before we enter upon the latter, which will require a more thorough and particular examination.

Summary proceedings are by statute; the common law is a stranger to them; they are conducted without a jury, and are dangerous accordingly.

By a *summary* proceeding I mean principally such as is directed by several acts of parliament, for the common law is a stranger to it, unless in the case of contempts, for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge: an institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute *offence.

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But it has of late been so far extended as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases. For,

These are,
I. Proceedings under the excise and revenue laws;

I. Of this summary nature are all trials of offences and frauds contrary to the laws of the *excise*, and other branches of the *revenue*: which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country; officers, who are all of them appointed and removable at the discretion of the crown. And though such convictions are absolutely necessary for the due collection of the public money, and are a

species of mercy to the delinquents, who would be ruined by the expence and delay of frequent prosecutions by action or indictment; and though such has usually been the *conduct* of the commissioners, as seldom, if ever, to afford just grounds to complain of oppression; yet when we again (*a*) consider the various and almost innumerable branches of this revenue: which may be in their turns the subjects of fraud, or at least complaints of fraud, and of course the objects of this summary and arbitrary jurisdiction; we shall find that the power of these officers of the crown over the property of the people is increased to a very formidable height (1).

II. Another branch of summary proceedings is that before *justices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited (*b*), and which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice hath however had some mischievous effects; as, 1. The almost entire disuse and contempt of the court-leet, and sheriff's tourn, the king's ancient courts of common law, formerly much revered and respected. *2. The burthensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting in the commission; from an apprehension that the duty of their office would take up too much of that time, which they are unwilling to spare from the necessary concerns of their families, the improvement of their understandings, and their engagements in other services of the public. Though if *all* gentlemen of fortune had it both in their power, and inclinations, to act in this capacity, the business of a justice of the peace would be more divided, and fall the less heavy upon individuals: which

II. Convictions before justices of the peace;

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(*a*) See vol. I. page 319, &c.

(*b*) Lambard and Burn.

(1) For full particulars of the statutes relating to this subject, and the decisions thereon, (far too numerous for insertion here,) see *Paley on Convictions*, 2d ed. by Dowling, index, titles, *Customs, Excise*. And as to convictions generally, see the same work, and 2

Harrison's Digest, 1379 et seq., where the decisions upon the subject, too numerous for insertion here, are all collected. The "formidable power" complained of in the text has latterly been rather increased than diminished.

would remove what in the present scarcity of magistrates is really an objection so formidable, that the country is greatly obliged to any gentleman of figure, who will undertake to perform that duty, which in consequence of his rank in life he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of, 3. A third mischief: which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so: but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our ancient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any further from our ancient constitution, by ordaining new penalties to be inflicted upon summary convictions.

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The process of these summary convictions, it must be owned, is extremely speedy: though the courts of common law have thrown in one check upon them, by making it necessary to *summon* the party accused before he is *condemned. This is now held to be an indispensable requisite (c); though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,

*“ Qui statuit aliquid, parte inauditâ alterâ,
Æquum licet statuerit, haud æquus fuit (2): ”*

(c) Salk. 181; 2 Lord Raym. 1405.

(2) “ He who decides a case without hearing both parties, though his decision may be just, is himself unjust; ” which is adopted as a principle of law by Lord Coke, in 11 Co. Rep. 99. A summons is indispensably required in all penal proceedings of a summary nature by justices of peace; *Rex v. Dyer*, 1 Salk, 181; 6 Mod. 41; and see the cases collected in 8 Mod. 154, note (a). It is declared by Lord Kenyon to be an invariable rule of law, *Rex v. Benn*, 6 T. R. 198; and it is stated by Mr.

Serjt. Hawkins to be implied in the construction of all penal statutes; 1 Hawk. P. C. 420. So jealous is the law to enforce this equitable rule, that the neglect of it by a justice in proceeding summarily without a previous summons to the party, has been treated as a misdemeanor, proper for the interference of the court of King's Bench by information; *Rex v. Venables*, 2 Ld. Raym. 1407; *Rex v. Simpson*, 1 Stra. 46; *Rex v. Allington*, id. 678; which has been granted upon affidavits of the

A rule to which all municipal laws, that are founded on the principles of justice, have strictly conformed; the Roman law requiring a citation at the least; and our own common law never suffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance by the party concerned. After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath (3); and then make his conviction of the offender, in writing: upon

fact; *Rex v. Harwood*, 2 Stra. 1088; 2 Burr. 1716, 1768; *Rex v. Constable*, 7 D. & R. 663; 3 M. C. 488. As this is a privilege of common right, which requires no special provision to entitle the defendant to the advantage of it, so it cannot be taken away by any custom; *Rex v. Cambridge* (university), 8 Mod. 163. Upon a sufficient information properly laid, the magistrates are bound to issue a summons, and proceed to a hearing; and if they refuse to do so, will be compelled by mandamus; *Rex v. Benn*, 6 T. R. 195. The summons should be directed to the party against whom the charge is laid; and should in general be signed by the justice himself by whom it is issued; *Rex v. Steventon*, 2 East, 365. Where a particular form of notice is prescribed by the Act, that must be strictly pursued; *Rex v. Croke*, Cowp. 30. The intention of the summons being to afford the person accused the means of making his defence, it should contain the substance of the charge, and fix a day and place for his appearance; allowing a sufficient time for the attendance of himself and his witnesses; *Rex v. Johnson*, 1 Stra. 260. A summons to appear immediately upon the receipt thereof, has been thought insufficient in one case; 2 Burr. 681. In another, an objection made to the summons that it was to appear on the same day, was only removed by the fact of the defendant having actually appeared, and so waived any irregularity in the notice; *Rex v. Johnson*, 1 Stra. 261. It is equally necessary that it should be to

appear at a place certain: otherwise the party commits no default by not appearing; and the magistrate cannot proceed in the defendant's absence upon a summons defective in these particulars, without making himself liable to an information; *Rex v. Simpson*, 1 Stra. 46. It has been made a question whether the service of the summons must be *personal*. It seems in general necessary that it should be so, unless where personal service is expressly dispensed with by statute. Parker, C. J., was of that opinion; 10 Mod. 345. And the provisions specially introduced into many Acts of Parliaments, to make a service at the dwelling-house sufficient, seem to justify the inference, that the law in other cases is understood to require a service upon the person. Where personal service is not necessary, leaving a copy at the house is sufficient; *Rex v. Chandler*, 14 East, 268; and the delivery may be to a person on the premises, apparently residing there as a servant; *Id. ibid.* These rules apply, however, only to those cases where the defendant does not in fact appear; for if he actually appears and pleads, there is no longer any question upon the sufficiency or regularity of the summons; 1 Stra. 261. Paley on Convictions, 2d ed. by Dowling, 21, 23.

(3) The magistrate has, in general, no authority to compel the attendance of witnesses for the purpose of a summary trial; unless where it is specially given by act of parliament. This, in many cases, has been done; and in sundry Acts the provision is accom-

which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on

panied with a penalty on refusal to attend for the purpose of being examined. It seems agreed that the examination of witnesses must be upon oath, and that no legal conviction can be founded upon any testimony not so taken. There is a difference in the manner in which the Acts are worded, in regard to the mode of examination to be pursued; for, while some Acts expressly mention the testimony of witnesses *on oath*, others, in general terms, authorize the magistrate *to hear and determine*, or to *convict or give judgment on the examination of witnesses*, without noticing the oath. But such general expressions seem, in legal construction, necessarily to refer to the only kind of testimony known to the law, namely, that upon oath. "For," says Dalton, "in all cases, wheresoever any man is authorized to examine witnesses, such examination shall be taken and construed to be as the law will, *i.e.* upon oath." Dalt. c. 6, § 6; and see *id.* c. 115, c. 164; Plowd. 12, *a.*; Lamb, 517; *ex parte* Aldridge, 4 D. & R. 83; 2 M. C. 120; *Rex v. Glossopp*, 4 B. & A. 616; Paley, 33, 34. Although no mode of examination be pointed out by the statutes giving jurisdiction over the offence; yet, as justice requires that the accused should be confronted with the witnesses against him, and have an opportunity of cross-examination, it is required by law, in the summary mode of trial now under consideration, that the evidence and depositions should be taken in the presence of the defendant, where he appears. For though the legislature, by a summary mode of inquiry, intended to substitute a more expeditious process for the common law method of trial, it could not design to dispense with the rules of justice, as far as they are compatible with the method adopted. Indeed, it may be useful upon this occasion to notice the general

maxim which has been laid down as a guide to the conduct of magistrates in regulating all their summary proceedings, namely, that "Acts of Parliament, in what they are silent, are best expounded according to the use and reason of the common law;" *Rex v. Simpson*, 1 Stra. 45. Unless, therefore, the defendant forfeits this advantage by his wilful absence, he ought to be called upon to plead before any evidence is given; 1 T. R. 320. And the witnesses must be sworn and examined in his presence; *Rex v. Vipont*, 2 Burr. 1163. Or, if the evidence has been taken down in his absence, and is read over to him afterwards, the witness must at the same time, unless the defendant upon hearing the evidence should confess the fact, *Rex v. Hall*, 1 T. R. 320, be resworn in his presence, and not merely called upon to assert the truth of his former testimony; *Rex v. Crowther*, 1 T. R. 125. For the intent of the rule is, that the witness should be subjected to the examination of the defendant upon his oath; 2 Burr. 1163; and see *Rex v. Kiddy*, 4 D. & R. 734; 2 M. C. 364. This rule is confirmed, rather than contradicted, by those cases wherein convictions have been sustained without expressly alleging the evidence to have been taken in the presence of the defendant; *Rex v. Baker*, 2 Stra. 1240; *Rex v. Aiken*, 3 Burr. 1786; *Rex v. Kempson*, Cowp. 241. For it will be found that in all those cases the judgment proceeded upon a presumption collected from the whole conviction, that the defendant was in fact present, and did hear the evidence given, which was always admitted to be necessary to the regularity of the magistrate's proceedings; *Rex v. Vipont*, 2 Burr. 1163; and see *Rex v. Lovat*, 7 T. R. 152; *Rex v. Thompson*, 2 T. R. 18; *Rex v. Swallow*, 3 T. R. 284; Paley, 39, 40.

him, or else to levy the penalty incurred, by distress and sale of his goods (4). This is, in general, the method of sum-

(4) In all cases in which magistrates are authorized, upon application, to issue a distress warrant for non-payment of any rate, although they have no power to relieve, it is their duty first to call the party before them by summons, unless by Act of Parliament it is specially directed that the warrant shall be issued immediately; *Rex v. Justices of Borough of Stafford*, 5 Nev. & Man. 94. The power of proceeding by these compulsory methods is derived entirely from special statutory provisions, and is not any necessary consequence of a conviction. If a statute only confers a power to convict, without making provision for the recovery of the penalty, there seems to be no compulsory means of carrying such a law into effect. It is usual, therefore, for the statutes inflicting penalties to contain an express authority for this purpose. It is sometimes directed to be exercised immediately, upon non-payment of the penalty; in other cases, only upon failure of payment after a certain number of days. When the justice is empowered to issue his warrant, on refusal or neglect of payment for a certain number of days, it seems to be understood, that no demand is necessary to enable him to do so after the expiration of that time; *Wootton v. Harvey*, 6 East, 75. Those statutes which give a power of appeal to the party convicted, frequently also provide, that, upon the appeal, and security given for prosecuting it, the distress shall be stayed till the determination of the appeal. In such cases, after the appeal is decided, if the time limited for making the distress be expired, the magistrate may, it seems, issue his warrant immediately without any fresh demand; for the time runs from the order; *Id. Ibid.* But if the warrant has been issued before, and suspended by the appeal, it is better, after the decision of the appeal, to apply

to the magistrate and lay the facts before him, before proceeding to the execution of the warrant; *id.* 79. Per Lawrence, J. The warrant should be under the hand and seal of the justice, and directed to the constable, &c., of the parish, &c., in which the goods to be distrained upon are found. Where the justice has reasonable ground for doubting his jurisdiction, the court will not compel him to issue a warrant of distress, which may subject him to an action; *Rex v. Bucks*, (Justices,) 2 D. & R. 687; 1 M. C. 366; 1 B. & C. 485. The warrant shortly recites the conviction, and commands the officer to levy the sum specified, directing to whom it is to be paid. Care must be taken that the commitment is warranted by the conviction, for a legal conviction will not help an informal commitment; *Rogers v. Jones*, 5 D. & R. 268; 2 M. C. 211; 3 B. & C. 159. See *Bane v. Metheun*, 3 M. C. 521; 9 J. B. Moore, 161; *Wicks v. Clutterbuck*, 3 M. C. 536; 9 J. B. Moore; *Rex v. Payne*, 4 D. & R. 72; 2 M. C. 169; *Rex v. Helps*, 3 M. & S. 331. In general the warrant should appoint a time and place for returning it. *Rex v. Wyatt*, Fort. 127; 2 Ld. Raym. 1189; 1 Salk 380. The constable is the proper officer to execute the warrant; Carth. 78. And he is indictable for refusal or wilful neglect; *Rex v. Wyatt*, Fort. 127. And see 2 Ld. Raym. 9; 2 Rol. Rep. 78; 2 Hawk. P. C. c. 16, § 5. If the warrant be directed to all constables generally, no one in particular can execute it out of his own district; but if it be directed to a particular constable by name, he may execute it any where within the jurisdiction of the magistrate; *Rex v. Weir*, 2 D. & R. 444; 1 M. C. 319; 1 B. & C. 288. And see Carth. 508; 1 Salk. 176; 2 Hawk. P. C. c. 13, § 20; 1 Burn, Distress; *Gimbert v. Coyney*,

mary proceedings before a justice or justices of the peace: but for particulars we must have recourse to the several statutes, which create the offence, or inflict the punishment: and which usually chalk out the method by which offenders are to be convicted. Otherwise they fall, of course, under the general rule, and can only be convicted by indictment or information at the common law.

III. Attachments for contempts of courts,

III. To this head, of summary proceedings, may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by *attachment*, and the subsequent proceedings thereon.

which are, direct, or, consequential.

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The contempts, that are thus punished, are either *direct*, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else are *consequential*, which (without such gross insolence or direct opposition) *plainly tend to create an universal disregard of their authority. The principal instances, of either sort, that have been usually (*d*) punishable by attachment, are chiefly of the following kinds:—1. Those committed by inferior judges and magistrates; by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are intrusted to their distribution (5); or by disobeying the king's writs issuing out of the superior courts (6), by proceeding in a cause after it is put a stop to or removed by writ of prohibition,

(*d*) 2 Hawk. P. C. 142, &c.

3 M. C. 323; 1 M'Clel. & Y. 469. If the offender be a *feme covert*, the goods of the husband are not liable to be distrained for the penalty; 11 Co. Rep. 61. *b*. The constable cannot break open outer doors for the execution of the warrant, except the whole or part of the forfeiture belongs to the king; 2 Hawk. P. C. c. 14, § 5; *Theobald v. Crickmore*, 1 B. & A. 227; *Parton v. Williams*, 3 B. & A. 330; *Lamock v. Brown*, 2 B. & A. 592; Paley, 233, 236.

(5) There are instances upon record of magistrates being punished by attachment for acting as judges in matters in which they themselves were parties; the *Mayor of Hereford's case*, 2 Ld. Raym. 766; 1 Salk. 396. In an

anonymous case, 1 Salk. 201, it is said, "all misdemeanors in judicial officers are a contempt of the court of B. R., and attachments go daily against stewards, for granting attachments against all the party's goods. And Holt, C.J., remembered a case of the mayor of Hereford, who gave judgment for his own lessee in ejectment." And see *Rex v. Hoseason*, 14 East, 606.

(6) An attachment was ordered against the mayor of a corporation, for not making a return to a peremptory mandamus, within the time prescribed by the writ, though there was no personal service thereof; *Rex v. Fowey*, 5 D. & R. 614.

certiorari, error, *supersedeas*, and the like. For, as the king's superior courts (and especially the court of King's Bench) have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty (7). 3. Those committed by attorneys and solicitors, who are also officers of the respective courts: by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice (8). For the mal-practice of the officers reflects some dishonour on their employers: and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen, in collateral matters relating to the discharge of their office; such as making default, when summoned; refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviours or irregularities of a similar kind: but not in the mere exercise of their judicial capacities, as by giving a false or erroneous

(7) An attachment *nisi* was granted against the town clerk of Guildford, and a person who had been convicted under the Game Act, the former for granting, and the latter for suing out, a replevin of goods distrained for the penalty; *Rex v. Burchett*, 1 Stra. 557. An attachment was granted against a person who had replevied three horses seized under a magistrate's warrant as forfeited under a Turnpike Act; *Rex v. the Sheriff of Leicestershire*; Barnard, 110. An attachment was issued against the under sheriff of Cumberland, for granting a replevin of goods distrained on a conviction for deer stealing; *Rex v. Monkhouse*, 2 Stra. 1184. An attachment was granted for arresting the plaintiff while attending arbitrators under a rule of court, on purpose to prejudice his cause; *Rex v. Hall*, 2 W. Bla. 1110.

(8) Where an attorney is charged by affidavit with any fraud or mal-practice in his profession, contrary to the obvious rules of justice and common honesty, the courts on motion will order him to answer the matters of the affidavit; and, in general, if he positively deny the mal-practices imputed to him, they will dismiss the complaint; but otherwise they will grant an attachment; Tidd, 79; Imp. K. B. 83; Bac. Abr. Attorney, H. And, if an attorney, required to answer the matters of an affidavit, swear in his exculpation to an incredible story, an attachment will be granted against him, though he positively deny the mal-practices imputed to him; in re Crossley, 6 T. R. 701; and see Tidd, 70, 79, 231, 427, 496.

verdict (9). 5. Those committed by witnesses: by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn (10). 6. Those

(9) Vide, *ante*, 140, notes (44) and (45); post 361.

(10) The court of King's Bench has no power to grant an attachment against a witness for disobeying a subpoena issued out of the court of quarter sessions; *Rex v. Room*, 3 Nev. & Man. 725. An attachment lies against an attorney in the cause, for not attending upon a subpoena, to give evidence of collateral facts; *Doe v. Andrews*, 2 Stra. 810; 2 Ld. Raym. 1528; Cowp. 845. But an attorney is not liable to an attachment for refusing to obey a subpoena to appear before the grand jury, and give evidence, on an indictment for forgery, against his client; *Rex v. Dixon*, 3 Burr. 1687. In order to ground this summary proceeding, it is necessary to prove that the witness was personally served with a subpoena; 2 Stra. 1054. And see *Alexander v. Dixon*, 1 Moore, 387; 1 Bing. 366. And, in civil cases, that his reasonable expenses were paid, or tendered him; *Holme v. Smith*, 1 Marsh, 410; *Horne v. Smith*, 8 Taunt. 9; *Bowles v. Jackson*, 1 W. Bl. 36; *Fuller v. Prentice*, 1 H. Bl. 49; *Battye v. Gresley*, 8 East, 319; *Hallett v. Mears*, 13 East, 15; *Ashton v. Haigh*, 2 Chit. R. 201. Where a cause was referred to an arbitrator by order of nisi prius, and a witness, duly subpoenaed, refused to attend before the arbitrator, the court of K. B., on motion, refused to make any order upon him to attend the arbitrator and give evidence, though it was sworn that he was a material and necessary witness for the party making the application: the court being of opinion that as 130 years had elapsed since the passing of the statute 9 & 10 W. III. c. 1, which originated such references, and no precedent had been cited in support of the motion, it would not be safe or

proper for them to introduce so new a proceeding; *Wansell v. Southwood*, K. B., E. T. 1829. Ed. MS. It was admitted upon the discussion of that case, that a witness attending an arbitrator under a reference by order of nisi prius, would be privileged from arrest, *eundo, morando, et redeundo*, the same as if attending the court making the order; see *Randall v. Gurney*, 3 B. & A. 252, 1 Chit. R. 679; *Hicketts v. Gurney*, 7 Price, 699, 1 Chit. R. 682. And it was argued, that the arbitrator being the delegate and representative of the court, a refusal to appear before him upon subpoena, was a contempt of the court itself. There seems much weight in that argument, and the refusing the motion merely on the ground that there was no precedent for it, is no very satisfactory answer. If the court making an order of reference, has no power to compel the attendance of witnesses before the referee, it seems necessary that an Act of Parliament should be passed conferring that power; for otherwise the whole system of deciding suits by arbitration, which affords many advantages to suitors, while it gives much relief to the courts, may be rendered unavailing and useless. The motion for an attachment against a witness for not appearing, should, as in other cases of contempt, be made as early as possible; and, therefore, the court refused an attachment in Hilary term, for non-attendance at the preceding summer assizes. — *v. St. Leger*, H. T. 37 Geo. III. K. B. Tidd, 849; and see *Rex v. Stretch*, 5 Nev. & Man. 178, S. P. As to commitments by commissioners of bankrupt of a bankrupt, see *ante* 156 note (3); of a witness, see 6 Geo. IV. c. 16, §§ 33, 34, 39. On a question of the legality of the latter, all the questions

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committed by parties to any suit or proceeding before the court: as by disobedience to any *rule or order, made in the progress of a cause (11); by non-payment of costs awarded by the court upon a motion (12); or by non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination (e) (13). Indeed the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party; though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon. And, upon a similar principle, obedience to any rule of court may also, by statute 10 Geo. III. c. 50, be enforced against any person having privilege of parliament by the process of distress infinite. 7. Those committed by any other persons under the degree of a peer; and even by peers themselves, when enormous and

(e) See vol. III. page 17.

and answers must be looked at as forming one examination; and a witness cannot be committed for not answering as to his *belief* of the *intention* of the bankrupt, unless other parts of his examination shew such belief to be material with reference to the person, trade, dealing, or estate of the bankrupt; *Ex parte Bagster*, 8 B. & C. 344; 1 M. & R. 573. The commissioners cannot commit a witness for refusing to read an entry in a book. *Ex parte Isaac*, 3 Y. & J. 38. Where a witness summoned to give evidence before the commissioners refuses to appear, they may issue their warrant for his apprehension, without having information *on oath* of his refusal. In an action by such witness against the commissioners for false imprisonment, the reasonableness of the summons, and of the tender of expenses, is a question of fact for the jury; *Grocock v. Cooper*, 8 B. & C. 211; 2 M. & R. 78. Trespass

will not lie against commissioners for committing a witness for not satisfactorily answering on examination, though he appears to the court (K.B.) to have answered satisfactorily; *Doswell v. Impey*, 2 D. & R. 350; 1 B. & C. 163.

(11) *Doddington v. Hudson*, 8 Moore, 510, 610; 1 Bing. 410, 464; *Rex v. Edyvean*, 3 T. R. 352; *Bateman v. Phillips*, 4 Taunt. 157.

(12) *Lewis v. Morland*, 2 B. & A. 56; *Rex v. Curwen*, 1 Moore, 494; *Merrit v. Meek*, 3 Anstr. 656; *King v. Clifton*, 5 T. R. 257. A party arrested under an attachment for contempt of court in not paying money, is not entitled to be discharged upon tendering the amount to the officer; *Pitt v. Coombes*, 3 Nev. & Man. 212.

(13) *Good v. Wilkes*, Tidd, 1070; *Anon.*, Lofft, 321, 451; *Rex v. Wheeler*, 3 Burr. 1256; *Kenyon v. Grayson*, 2 Smith, 61.

accompanied with violence, such as forcible *rescous* and the like (*f*) (14), or when they import a disobedience to the king's great prerogative writs, of prohibition, *habeas corpus* (*g*), and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court (15); by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court, or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment (16);

(*f*) Styl. 227; 2 Hawk, P. C. 152.
Cro. Jac. 419; Salk. 586.

(*g*) 4 Burr. 632; Lords' Journ.
7 Feb. 8 June, 1757.

(14) Peers are not liable to be attached for the non-payment of money pursuant to an order of *nisi prius*, which has been made a rule of court; *Walker v. Earl Grosvenor*, 7 T. R. 171; 1 Tidd, 199. Nor are members of the House of Commons; *Catmur v. Knatchbull*, 7 T. R. 448; 1 Tidd, 200. But this privilege will not exempt from attachments for not obeying the process of the courts; *Rex v. Earl Ferrers*, 1 Burr. 631; 1 Tidd, 199.

(15) A defendant being served with a copy of a *capias*, tore it in pieces and threw it at the officer: held, not to amount to a contempt of court for which an attachment might be granted; *Myers v. Wills*, 4 Moore, 147. So, where a person, on being served with process, collared and shook the officer serving it, and ordered him to quit his presence; held, that this did not amount to a contempt of court and obstruction of its process, for which an attachment might be granted; *Adams v. Hughes*, 1 B. & B. 24. But in *Adamson v. Gibson*, H. T. 27 Geo. III. K. B. Tidd, 171, an attachment was moved for against the defendant's wife and daughter, for treating the process

of the court with contempt, by throwing it into the street; and the court said, that on a return by the sheriff, the rule for an attachment was absolute in the first instance; but on affidavits, the party must have an opportunity of answering.

(16) A court of general gaol delivery has jurisdiction to make an order to prohibit the publication of proceedings there, pending a trial likely to continue for several successive days, and to punish disobedience to such order by fine and imprisonment; *Rex v. Clement*, 4 B. & A. 218. And if the offending party, being summoned to attend the court to answer for the contempt, by an order issued for that purpose, should not appear, the court has jurisdiction to impose a fine on him in his absence. In *re Clement*, 11 Price, 68. And service of such an order, by leaving it with the servant of the party, who was the printer, publisher, and sole proprietor, of a newspaper, at the newspaper-office, is good; *Id.* And that court having jurisdiction to make such orders, the court of Exchequer refused to grant a rule *nisi* for the discharge of a party from such

and by any thing in short that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised, as early as the annals of our law extend. And, though a very learned author (*h*) seems inclinable to derive this process from the statute of Westm. 2, 13 Edw. I. c. 39, (which ordains, that in case the process of the king's courts be *resisted* by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a qua non deliberentur sine speciali præcepto domini regis* (17):" and if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consenters, commanders, and favourers, and by a special writ judicial they shall be *attached* by their bodies to appear before the court, and if they be convicted thereof they shall be punished at the king's pleasure, without any interfering by any other person whatsoever,) yet he afterwards more justly concludes, that it is a part of the *law of the land*; and, as such, is *confirmed* by the statute of *magna carta*.

If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges (*i*), without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless

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The process of attachment is a part of the law of the land, and as such confirmed by magna charta;

(*h*) Gilb. Hist. C. P. ch. 3.

(*i*) Staundf. P. C. 73, b.

a fine, on an application made to them for that purpose, after it had been estreated into the Exchequer, on the ground of the illegality of the proceeding, holding, that the fine might le-

gally be, and had been, most properly imposed; Id.; see 3 Y. & J. 91.

(17) From which they shall not be discharged without the special order of the king.

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by the confession of the party or the testimony of others, if the judges upon *affidavit* see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to shew cause why an attachment should not issue against him (*j*); or, in very flagrant instances of contempt, the attachment issues in the first instance (*k*); as it also *does, if no sufficient cause be shewn to discharge, and thereupon the court confirms and makes absolute the original rule (18). This process of attachment is merely intended to bring the party into court: and, when there, he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days (*l*): and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out (*m*). If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury (*n*). If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal or infamous punishment (*o*). If the contempt be of such a nature, that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of, (as in the case of a *rescous*, (*p*), the defendant may be admitted to make such simple acknowledgment, and receive his judgment, without answering to any interrogatories: but if he wilfully and obstinately refuses to answer, or answers in

(*j*) Styl. 277.(*k*) Salk. 84; Stra. 185, 564.(*l*) 6 Mod. 73.(*m*) Stra. 444.(*n*) 6 Mod. 73.(*o*) Cro. Car. 146.(*p*) The *King v. Elkins*, M. 8 Geo. III. B. R.

(18) Where contemptuous words are spoken of the *court*, the attachment issues in the first instance; 6 Mod. 43; 1 Salk. 84; 1 Stra. 185; Say, R. 47, R. T. 17 Geo. III. K. B. For it would be to no purpose to grant a rule to shew cause, which would probably expose the court to further insult; 1 Salk. 84. It has been doubted, however, whether when such words are

sworn to by one person only, the rule should be absolute, or only to shew cause; 2 Stra. 1068. The rule in chancery requiring two affidavits, to deprive the party of the benefit of shewing cause; and in the King's Bench the rule is only to shew cause, where the words are spoken of its *process*. Say, R. 114; Tidd, 171, where see further on this subject.

an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court (19).

It cannot have escaped the attention of the reader, that this method, of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance (*q*); and seems indeed to have been derived to the courts of King's Bench and Common Pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till *the introduction of sequestrations, in the nature of a process of contempt; acting only *in personam* and not *in rem*. And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by *affidavits* of the adverse party: whereas, in the courts of law, the admission of the party to purge himself by oath is more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this singular mode of trial, thus admitted in this one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely ancient (*r*), and has in more modern times been recognised, approved, and confirmed, by several express acts of parliament (*s*), so the method of examining the delinquent himself upon oath, with regard to the contempt alleged, is at least of as high antiquity (*t*), and by long and immemorial usage is now become the law of the land.

the mode of examination is contrary to the genius of the common law, but has, by immemorial usage, become the law of the land.

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(*q*) See vol. III. page 100, 101.

(*r*) Yearb. 20 Hen. VI. 37; 22 Edw. IV. c. 29.

(*s*) Stat. 43 Eliz. c. 6, § 3; 13

Car. II. st. 2, § 4; 9 & 10 W. III. c. 15; 12 Ann. st. 2, c. 15, § 5.

(*t*) M. 5 Edw. IV. rot. 75, cited in

Rast. Ent. 268, pl. 5.

(19) In general, a defendant under attachment *must* answer interrogatories; he cannot come in and confess the contempt before he does so; *Rex v. Edwards*, 4 Burr. 2105; 1 W. Bla. 637. Where a defendant is brought up on attachment, it is the practice of the court to put interrogatories to him, although he do not deny the charge in the affidavits, unless the prosecutor waives his right of putting them; *Rex*

v. Horsley, 5 T. R. 362. A defendant may be admitted to bail, and sworn to answer interrogatories upon an attachment for contempt, although a defective notice of bail have been served on the prosecutor. In *re* —, 4 D. & R. 393. The keeper of a gaol has been sworn to answer interrogatories, touching a contempt committed for default of bail; *Anon. Lofft*, 300.

CHAPTER XXI. OF ARRESTS.

Regular proceedings in courts of criminal jurisdiction are,

WE are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order: *viz.* 1. Arrest; 2. Commitment and bail; 3. Prosecution; 4. Process; 5. Arraignment, and its incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and its consequences; 10. Reversal of Judgment; 11. Reprieve, or pardon; 12. Execution; all which will be discussed in the subsequent part of this book.

1. Arrest; to which all persons are liable, and which may be made,

First, then, of an *arrest*: which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases: but no man is to be arrested, unless charged with such a crime as will at least justify holding him to bail, when taken. And, in general, an arrest may be made four ways: 1. By warrant; 2. By an officer without warrant; 3. By a private person also without warrant; 4. By an hue and cry.

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1. By a warrant,

1. A warrant may be granted in extraordinary cases by the privy council, or secretaries of state (*a*); but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence; in order to compel the person accused to appear before them (*b*); for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. Sir Edward Coke indeed (*c*) hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion: no, not even till an indictment be actually

(*a*) 1 Lord Raym. 65.

(*b*) 2 Hawk. P. C. 84.

(*c*) 4 Inst. 176.

found; and the contrary practice is by others (*d*) held to be grounded rather upon connivance, than the express rule of law; though now by long custom established. A doctrine, which would, in most cases, give a loose to felons to escape without punishment; and therefore Sir Matthew Hale hath combated it with invincible authority, and strength of reason: maintaining, 1. That a justice of peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted* (*e*); and, 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed (*f*) (1). This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the *constable, or other peace officer, (or, it may be, to any private person by name) (*g*), requiring him to bring the party either generally before *any* justice of the peace for the county, or only before the justice who granted it (2); the warrant in the latter case being called a *special* warrant (*h*). A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty (*i*); for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no

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(*d*) 2 Hawk. P. C. 84.

(*e*) 2 Hal. P. C. 108.

(*f*) Ibid. 110.

(*g*) Salk. 176.

(*h*) 2 Hawk. P. C. 85.

(*i*) 1 Hal. P. C. 580; 2 Hawk. P. C. 82; 1 W. Bl. 555.

(1) A positive oath that a felony is actually committed is *not* necessary to justify a magistrate in granting his warrant to search the premises and apprehend the person of a party suspected of a felony: *Elsee v. Smith*, 1 D. & R.

97. And see the cases upon this subject there cited.

(2) See the observations made upon this subject, *ante*, 283, notes (2), (3), and (4), which seem equally applicable here.

legal warrant: for the point upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is, therefore, in fact, *no* warrant at all; for it will not justify the officer who acts under it (*k*): whereas, a warrant properly penned, even though the magistrate who issues it should exceed his jurisdiction, will, by statute 24 Geo. II. c. 44, at all events indemnify the officer, who executes the same ministerially (3). And, when a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief, or other, justice of the court of King's Bench, extends all over the kingdom; and is *teste'd*, or *dated*, *England*; not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by the justice of the *peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes 23 Geo. II. c. 26, and

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(*k*) A practice had obtained in the secretaries' office ever since the restoration, grounded on some clauses in the Acts for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers, and publishers, of such obscene or seditious libels, as were particularly specified in the warrant. When those Acts expired in 1694, the same practice was inadvertently continued, in every reign, and under every administration, except the four last

years of Queen Anne, down to the year 1763; when such a warrant being issued to apprehend the authors, printers, and publishers, of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole court of King's Bench to be void, in the case of *Money v. Leach*; Trin. 5 Geo. III. B. R.* After which, the issuing of such general warrants was declared illegal by a vote of the House of Commons, (Com. Journ. 22 Apr. 1766.)

(3) But the officer will not in general be protected where he acts without a warrant; *Postlethwaite v. Gibson*, 3 Esp. 226. Nor, unless he acts strictly in obedience to the warrant; *Money v. Leach*, 3 Burr. 1768; *Pres- tridge v. Woodman*, 2 D. & R. 43;

1 B. & C. 13; *Crozier v. Cundy*, 9 D. & R. 224; 6 B. & C. 232; *Bell v. Oakley*, 2 M. & S. 259; *Milton v. Green*, 5 East, 233; 1 Smith, 402; *Cook v. Leonard*, 6 B. & C. 351; 9 D. & R. 339.

* 1 W. Bla, 555, 563; 3 Burr. 1742.

24 Geo. II. c. 55. And now, by statute 13 Geo. III. c. 31, any warrant for apprehending an English offender, who may have escaped into Scotland, and *vice versa*, may be indorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdoms in which such offence was committed (4).

2. Arrests by *officers, without warrant*, may be executed, 2. By officers without warrant, as justices, sheriffs, coroners, constables, and watchmen.

1. By a justice of the peace; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence (1).
 2. The sheriff, and 3. The coroner (5) may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke (m), hath great original and inherent authority with regard to arrests (6). He may, without warrant, arrest any one for a breach of the peace, committed in his view, and carry him before a justice of the peace (7). And, in case of felony *actually* committed, or a dangerous wounding whereby felony is like to ensue, he may upon probable suspicion arrest the felon (8); and for that pur-

(1) 1 Hal. P. C. 86.

(m) See vol. I. page 355.

(4) A similar provision is made with respect to Ireland, by statute 44 Geo. III. c. 92.

(5) Coroners are conservators of the king's peace, and become magistrates by virtue of their election and appointment. This privilege, independently of their mere official duties, they are entitled at this day to exercise; and are empowered to cause felons to be apprehended, as well those that have been found guilty after inquisition, as those suspected of guilt, or present at the death, and not guilty; as also burglars and robbers, in respect of whom no inquisition can be taken; Fitz. Just. 163; Mir. C. 1, § 18; Brit. 6; Lamb. Just. 378; 1 Salk. 347; Jervis on the Office and Duty of Coroners, 21.

(6) For a particular account of the power and authority of constables, see Ritson's Constable, c. 4, p. 36 et seq.

(7) But he is not justified in taking a person into custody for a mere assault, unless he is present at the time; *Coupey v. Henley*, 2 Esp. 540.

Using loud words in the street, though disorderly, is not an offence for which a party should be taken into custody; *Hardy v. Murphy*, 1 Esp. 294.

If a party be turning towards a wall in a street on a particular occasion, a constable is not justified in collaring him to prevent his so doing; *Booth v. Hanley*, 2 C. & P. 288.

If a constable is preventing a breach of the peace, and any person stands in his way to hinder him from so doing, the constable is justified in taking such person into custody, but not in giving him a blow; *Levi v. Edwards*, 1 C. & P. 40.

(8) An officer may justify an arrest on a reasonable charge of felony, without a warrant, although it afterwards appear that no felony had been committed; but a private individual cannot; *Samuel v. Payne*, 1 Doug. 359; *Beckwith v. Philby*, 6 B. & C. 635; 9 D. & R. 487. A private person cannot apprehend another upon a suspicion of felony, for the purpose of taking

pose is authorized, as upon a justice's warrant, to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrests, it is murder in all concerned (*n*) (9). 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I. c. 4, to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning (*o*) (10).

3. By a private person without warrant, upon view, or upon probable suspicion of felony committed;
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3. Any private person, and *a fortiori* a peace-officer, that is present when any felony is committed, is bound by the law *to arrest the felon; on pain of fine and imprisonment, if he escapes through the negligence of the standers by (*p*). And they may justify breaking open doors upon following such felon: and if *they kill him*, provided he cannot be otherwise taken, it is justifiable: though if *they are killed* in endeavouring to make such arrest, it is murder (*q*) (11). Upon probable suspicion also a private person may arrest the felon, or other person so suspected (*r*) (12). But he cannot justify breaking open doors to do it; and if either party kill the

(*n*) 2 Hal. P. C. 88, 96.

(*o*) Ibid. 98.

(*p*) 2 Hawk. P. C. 74.

(*q*) 2 Hal. P. C. 77.

(*r*) Stat. 30 Geo. II. c. 24.

him to the place where a theft was committed, in order to ascertain whether he was the thief; *Hall v. Booth*, 3 Nev. & Man. 316. But where a felony has actually been committed, a constable, or even a private person, acting *bonâ fide* and in pursuit of the offender, upon such information as amounts to a reasonable and probable ground of suspicion, may justify an arrest; *Ledwith v. Catchpole*, Cald. 291; and see *Adams v. Moore*, 2 Selw. N. P. 910; *post*, 293, 294, *in notis*.

(9) Vide *ante* 180, 184, 200, *in notis*.

(10) Watchmen and beadles have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no

proof of a felony having been committed; *Lawrence v. Hedger*, 3 Taunt. 14; and watchmen may imprison any person who encourages prisoners in their custody to resist or escape; *White v. Edwards*, Peake, 89. But where a watchman, authorized under a local Act to apprehend all vagrants, apprehended not the person, but the animal conducted by him, after it had ceased to be a nuisance in the street, it was held that he was not protected from an action; *Cook v. Leonard*, 6 B. & C. 355; 9 D. & R. 339.

(11) Vide *ante*, 292, note (9).

(12) A person observed in the night attempting to commit a felony, may be lawfully detained by any one, without warrant, till he can be carried before a magistrate; *Rex v. Hunt*, 1 R. & M. C. C. 93. Where a felony has ac-

other in the attempt, it is manslaughter, and no more (s). It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an *hue and cry* raised upon a felony committed. An *hue*, from *huer*, to shout, and cry, *hutesium et clamor*, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another (t). It is also mentioned by statute Westm. 1, 3 Edw. I. c. 9, and 4 Edw. I. *de officio coronatoris*. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I. c. 1 and 4, which directs, that from thenceforth every county shall be so well kept, that immediately upon robberies and felonies committed, fresh suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff. And, that such hue and cry may more effectually be made, the *hundred is bound by the same statute, c. 3, to answer for all robberies therein committed, unless they take the felon, which is the foundation of an action against the hundred (u), in case of any loss by robbery. By statute 27 Eliz. c. 13, no hue and cry is sufficient, unless made with both horsemen and footmen. And by statute 8 Geo. II. c. 16, the constable or like officer, refusing or neglecting to make hue and

4. By hue and cry.

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(s) 2 Hal. P. C. 82, 83.

Mirr. c. 2, § 6.

(t) Bracton, l. 3, tr. 2, c. 1, § 1;

(u) See vol. III. page 161.

tually been committed, a private person, acting *bonâ fide*, and in pursuit of the offender, upon such information as amounts to a reasonable and probable ground of suspicion, may justify an arrest; *Ledwith v. Catchpole*, Cald. 291. But he acts at his peril, and is liable to an action, unless he can establish in

proof that the party has actually been guilty of felony; *Adams v. Moore*, 2 Selw. N. P. 910. And if A. having been robbed, suspect B. to be guilty, and take him and give him in charge to a constable, B., if innocent, may support an action against A.; *Stonehouse v. Elliot*, 6 T. R. 315.

cry, forfeits 5*l.*: and the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon escapes (13). An institution, which hath long prevailed in many of the eastern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the last century; which is said to have effectually delivered that vast territory from the plague of robbers, by making in some places the villages, in others the officers of justice, responsible for all the robberies committed within their respective districts (*w*). Hue and cry (*x*) may be raised either by precept of a justice of the peace, or by a peace-officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon: and thereupon the constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot; and in the prosecution of such hue and cry the constable and his attendants have the same powers, protection, and indemnification, as if acting under the war-

(*w*) Mod. Un. Hist. vi. 383; vii. 156.

(*x*) 2 Hal. P. C. 100, 104.

(13) These statutes are all repealed by 7 & 8 Geo. IV. c. 27, and by the Larceny Act, 7 & 8 Geo. IV. c. 29, § 63, any person found committing any offence punishable by virtue of that Act, except only the offence of angling in the day time, may be immediately apprehended without a warrant by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorized by him, and forthwith taken before a justice of the peace, to be dealt with according to law; and if any credible witness shall prove upon oath before a justice of the peace, a reasonable cause to suspect that any person has in his possession, or on his premises, any property whatsoever, on or with respect to which any offence shall have been committed, the justice may grant a warrant to search for such property, as in

the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is authorized, and, if in his power, is required to apprehend and forthwith to carry before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.

By the Malicious Injuries Act, 7 & 8 Geo. IV. c. 30, § 28, any person found committing any offence against that Act, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before a justice of the peace, to be dealt with according to law.

rant of a justice of the peace. But if a man wantonly or maliciously raises an hue and cry, without cause, he shall be severely punished as a disturber of the public peace (*y*).

In order to encourage further the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by divers Acts of Parliament. The statute 4 and 5 W. and M. c. 8 (14) enacts, that such as apprehend a highwayman, and prosecute him to conviction, shall receive a reward of 40*l.* from the public; to be paid to them, or, if *killed in the endeavour to take him, their executors, by the sheriff of the county; besides the horse, furniture, arms, money, and other goods taken upon the person of such robber; with a reservation of the right of any person from whom the same may have been stolen: to which the statute 8 Geo. II. c. 16 (15), superadds 10*l.* to be paid by the hundred indemnified by such taking. By statutes 6 and 7 W. III. c. 17, and 15 Geo. II. c. 28, persons apprehending and convicting any offender against those statutes, respecting the coinage, shall, in case the offence be treason or felony, receive a reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By statute 10 and 11 W. III. c. 23 (16), any person apprehending and prosecuting to conviction a felon guilty of burglary, housebreaking, horsestealing, or private larceny to the value of 5*s.* from any shop, warehouse, coach-house, or stable, shall be excused from all parish offices. And by statute 5 Ann. c. 31 (17), any person so apprehending and prosecuting a burglar, or felonious housebreaker, or, if killed in the attempt, his executors, shall be entitled to a reward of 40*l.* (*z*). By statute 6 Geo. I. c. 23 (18), persons discovering, apprehending, and prosecuting to conviction, any person taking reward for helping others to their stolen goods, shall be entitled to forty pounds. By statute 14 Geo. II. c. 6, explained by 15 Geo. II. c. 34, (19), any person apprehending and prosecuting to conviction such

Rewards are given for the apprehension of felons.

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(*y*) 1 Hawk. P. C. 75.

(*z*) The statutes 4 & 5 W. & M. c. 8; 6 and 7 W. III. c. 17; and 5 Ann. c. 31; (together with 3 Geo. I.

c. 15, § 4, which directs the method of reimbursing the sheriffs,) are extended to the county-palatine of Durham, by stat. 14 Geo. III. c. 46.

(14) Repealed by 7 G. IV. c. 64.

(15) Repealed by 7 & 8 G. IV. c. 27.

(16) Repealed by 7 & 8 G. IV. c. 27, except § 7 & 8. Vide also 7

G. IV. c. 64.

(17) Repealed by 7 G. IV. c. 64.

(18) Repealed by 7 G. IV. c. 64.

(19) Repealed by 7 & 8 G. IV. c. 27.

as steal, or kill with intent to steal, any sheep or other cattle specified in the latter of the said Acts, shall for every such conviction receive a reward of ten pounds. Lastly, by statute 16 Geo. II. c. 15, and 8 Geo. III. c. 15, persons discovering, apprehending, and convicting felons and others being found at large during the term for which they are ordered to be transported, shall receive a reward of twenty pounds (20).

(20) The 4 W. & M. c. 8, § 2; 6 & 7 W. III. c. 17, § 9; 5 Ann. c. 31, § 1; 14 G. II. c. 6, § 2; and 15 G. II. c. 28, § 7, so far as they related to the rewards enumerated in the text, were repealed by 58 G. III. c. 70, which authorized the court, before which any felon should be tried, to order the county treasurer to pay to the prosecutor or witnesses *who should appear to have been active in the apprehension of any person*, and who should give evidence against any person accused of grand or petit larceny, &c., the costs of prosecuting and appearing before the grand jury; and also to compensate them *for their loss of time and trouble in such apprehension*. Where a person had travelled 300 miles, and incurred an expense of 17*l.*, in tracing and endeavouring to bring two horse-stealers to justice, and had succeeded in apprehending them: held, by Park, J., that under this statute he was not entitled to any compensation for the money so expended; *Rex v. Austen*, D. & R. N. P. C. 24. But now by statute 7 G. IV. c. 64, § 22, courts may order payment of the expenses of all prosecutions for felony, and allow persons attending on recognizances, where no bill is preferred, a reasonable sum to reimburse their expenses. By § 23, courts may order payment of the expenses of any prosecution for misdemeanor, in cases of assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property knowing the same to have been stolen, of any assault upon a peace-officer in the execution of his duty, or upon any person acting in aid of such

officer, of any neglect or breach of duty as a peace-officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury. By § 24, the order for payment is directed to be made out by the proper officer of the court, and paid by the county treasurer. Sect. 25 points out the mode for payment of these expenses in places not contributing to the county rate, such as liberties, franchises, cities, and towns, all of which are respectively rendered chargeable. Sect. 26 empowers the justices at quarter sessions to regulate such costs and expenses. By § 28, courts may order compensation to parties who have been active in the apprehension of certain offenders as therein described. Sect. 29 authorizes the sheriff to pay such order, who is to be reimbursed by the treasury. By § 30, if any man is killed in attempting to apprehend any of the offenders mentioned in § 28, the court may order compensation to his family. The above Act repeals the 4 W. & M. c. 8; 10 & 11 W. III. c. 23, § 1, 2; 5 Ann. c. 31, § 1; 14 G. II. c. 6; 18 G. III. c. 19, § 7 & 8; and 58 G. III. c. 70. See further as to costs and restitution of goods, *post*, 362. Where the prosecutor of an indictment for a misdemeanor found at sessions, removes it into K. B. by *certiorari*, he is not entitled to costs under 7 G. IV. c. 64, § 23; *Rex v. Richards*, 8 B. & C. 420; 2 M. & R. 405.

The court of King's Bench will not

issue a mandamus to the *treasurer* of a town or county, commanding him to obey an order made by a judge of assize for the payment of the costs of the prosecutor and witnesses in an indictment for a misdemeanor, under 7 G. IV. c. 64, § 23; *Rex v. Jeyes*, 5 Nev. & Man. 101.

A party was bound over to prosecute at the sessions, in a case within 7 G. IV. c. 64, § 23, but prosecuted at the as-

sizes. Witnesses were called upon subpœnas from the clerk of assize. Held, that the *witnesses* were entitled to an order for their costs under that statute; but, doubted, whether the *prosecutor* was so entitled; *Id. ibid.*

In the case of an indictment removed into K. B. by *certiorari*, the court has no power to order the payment of costs incurred *before* the removal; *Rex v. Pasman*, 3 Nev. & Man. 730.

CHAPTER XXII.

OF COMMITMENT AND BAIL.

Of commitment
and bail.

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace (1): and how he is there to be treated, I shall next shew, under the second head, of *commitment* and *bail*.

Duty of justices
before commit-
ment; when
they may dis-
charge; are

The justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged (2); and to this end by statute 2 and 3 Ph. and M.

(1) A constable, arresting a man on suspicion of felony, is bound to take him before a magistrate as soon as he reasonably can: and he has no right to detain a prisoner three days without taking him before a magistrate, in order that evidence may be collected in support of a felony with which he is charged; nor has he a right to handcuff him, except he has attempted to escape, or except it is necessary in order to prevent his escaping; *Wright v. Court*, 6 D. & R. 623. And see 2 Hawk. P. C. 117.

(2) It is the duty of the magistrate to take and complete the examination of all concerned, and to discharge or commit the individual suspected, as soon as the nature of the case will admit; Fost. 142, 3. But he is allowed a *reasonable* time for this purpose, before he makes his final decision. It seems to have been formerly considered, that the law intends three days to be sufficient, and that a magistrate cannot justify the detainer of a party eighteen days under examination; *Scavage v. Tateham*, Cro. Eliz. 829; 1 Hale, P. C. 585, 6; 2 id. 120, 1; 2 Hawk. P. C. c. 16, s. 12; 1 Chit. Cr. L. 72. This

point was considered in a very recent case, *Davis v. Capper*, 10 B. & C. 28; 5 M. & R. 53. That was an action against a magistrate for false imprisonment. The plaintiff had been brought before the defendant upon suspicion of felony, and was committed by him for further examination for fourteen days. The court, without giving judgment upon the whole case, which comprehended other questions, expressed a strong opinion that fourteen days was not a reasonable period for commitment for re-examination, and that a warrant for such commitment was bad for not setting forth full and satisfactory reasons for committing for so long a period; and they referred to the case of *Scavage v. Tateham*, Cro. Eliz. 829, as justifying that opinion. A dispute having arisen concerning goods deposited by A. with B. as a security, B. obtained from C., a police magistrate, a summons requiring A.'s appearance on a day named. Upon the appearance before C., B. made oath to a written information, that he *believed* the goods to have been illegally pawned or disposed of by A. C. gave to the parties a further day, at which, after evidence

c. 10, he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes (a), was the first warrant given for the examination of a felon in the English law (3). For, at the common law *nemo tenebatur prodere seipsum*: and his fault

bound to accept reasonable bail where it is admissible.

(a) Eirenarch, b. 2, c. 7. See page 357.

being gone into, C. committed A. for re-examination on a charge of suspicion of having unlawfully disposed of the goods of B. It was held that the charge was not so made as to give the magistrate jurisdiction over the matter, under § 8 of the Pawnbroker's Act, 39 & 40 G. III. c. 99; *Tate v. Chambers*, 3 Nev. & Man. 523.

And it was doubted whether, in a case upon that statute, properly brought before a magistrate, the party can be committed for re-examination; *Id. ibid.*

(3) The 2 & 3 P. & M. c. 10, is repealed by the 7 G. IV. c. 64; by § 2 of which it is enacted, "that two justices before they shall admit to bail, and one or two justices before he or they shall commit any person arrested for, or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who know the facts and circumstances of the case, and shall put the same, or so much thereof as shall be material, into writing, and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know or declare any thing material, touching any such felony or suspicion of felony, to appear at the court at which the trial thereof is intended to be, there to prosecute or give evidence against the party accused: and such justices shall subscribe all such examinations, informations, bailments, and recognizances, and deliver, or cause the same to be delivered to the proper officer of the court, before or at the opening of the court." As to the cases in which depositions taken under the statute are evidence, see 2 Chit. Burn,

Examination. Where the prosecutrix in a case of felony is bed-ridden, and there is no probability that she will ever be able to leave her house, the judge will admit her deposition before the magistrate, the same as if she were dead; *Rex v. Hogg*, 6 C. & P. 176. A. who was a witness for the prosecution against B., on a charge of arson, had first been examined by the magistrate before any specific charge had been made against any person, and his deposition taken in writing. A. was next accused of the offence, and his statement as a prisoner was also taken down by the magistrate. After this, B. was charged with the offence, and A. examined as a witness, when A.'s statement made at that time was taken down, B. being then committed. Held, that all these statements of A., so taken down, should have been returned to the judge, and not merely the statement made when B. was committed; *Rex v. Simons*, *id.* 540. Depositions should not be full of technical terms, but all depositions should be taken in the presence of the party accused, and taken down in the exact natural language, and peculiar expressions used by the prosecutor or witnesses. This would prevent the deponents' being unable to recollect what they had said. Many depositions, on the contrary, are filled up either with Latin words or law technicalities, which, when read over to the witnesses, it was impossible they could understand. The defendant, in all such cases, should be permitted to cross-examine the witnesses, and the depositions should be taken down in all particulars completely and accurately, as the evidence was actually given."

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was not to be wrung out of himself, but rather to be discovered by other means, and other men. If upon this inquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a *capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life? and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity? Upon a principle similar to which, the Athenian magistrates, when they took a solemn oath, never to keep a citizen in bonds that could give three sureties of the same quality with himself, did it with an exception to such as had embezzled the public money, or been guilty of treasonable practices (b). What the nature of bail is, hath been shewn in the preceding book (c). *viz.* a delivery or bailment, of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol. In civil cases we have seen that every defendant is bailable; but in criminal matters it is otherwise. Let us therefore inquire, in what cases the party accused ought, or ought not, to be admitted to bail.

(b) Pott. Antiq. b. 1, c. 18.

(c) See vol. III. page 290.

Per Garrow, B., 1 Chetw. Burn, 1005, note. The prisoner's examination must *not* be upon oath; that of the witnesses must be; 2 Hale, P. C. 52; 1 id. 585; 1 Phil. Ev. 106. Where magistrates first took the examination of witnesses, not on oath, in support of a conviction, and afterwards swore them to the truth of their evidence, the court of King's Bench expressed their disapprobation of the practice; *Rex v. Kiddy*, 4 D. & R. 734; see *ante*, 283, note (3).

The prisoner has no *right* to the assistance of an attorney, when under examination on a charge of felony; the privilege, when allowed, is entirely a matter of discretion in the magistrate; *Cox v. Coleridge*, 2 D. & R. 86; 1 B. & C. 37; 1 M. C. 142. See, however, an elaborate note on this important subject, Paley on *Convictions*, 2d ed. by Dowling, 28 et seq., where the propriety of that decision is considered; and see *ante* 3, note (1).

And, first, to refuse or delay to bail any personailable, is an offence against the liberty of the subject, in any magistrate by the common law (*d*), as well as by the statute Westm. 1, 3 Edw. I. c. 15 (4), and the *Habeas Corpus* Act 31 Car. II. c. 2 (5). And, lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. and M. st. 2, c. 1, that excessive bail ought not to be required; though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine (6). And, on the other hand, if the magistrate takes insufficient bail, he is liable to be fined, if the criminal doth not appear (*e*). Bail may be taken either in court or, in some particular cases, by the sheriff, coroner, or other magistrate; but most usually by the justices of the peace. Regularly, in all offences either against the common *law or Act of Parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special Act of Parliament (*f*) (7). In order therefore more precisely to ascertain what offences *are*ailable,

Justices may not refuse or delay to bail; and may not require excessive, or accept insufficient bail.

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(*d*) 2 Hawk. P. C. 90.

(*f*) 2 Hal. P. C. 127.

(*e*) Ibid. 89.

(4) Repealed by 7 Geo. IV. c. 64; see post, 298, note (8).

(5) And see 56 Geo. III. c. 100.

(6) It was formerly a general rule in the court of King's Bench to require four bail in cases of felony; *Rex v. Shaw*, 6 D. & R. 154; but in one case, on a charge of rape, the accused was held to bail by himself and three sureties; *Rex v. Booth*, 2 Ld. Ken. 170. And see now the statute 5 & 6 W. IV. c. 33, § 3, set out post 298, latter part of note (8).

(7) By the 7 Geo. IV. c. 64, § 3, every justice of the peace before whom any person shall be taken on charge of misdemeanor, or suspicion thereof, shall take the examination, &c. in like manner as in cases of felony. See § 2 of the same Act, ante, 296, note (3). Persons committed for forcibly resisting custom-house officers in the execution of their duty, cannot demand to

be bailed as of right; *Rex v. Dunn*, 5 Burr. 2640. A commitment by a justice of peace for a time certain, as for fourteen days, under the Vagrant Act, is a commitment in execution, and the party is not entitled to be bailed; *Rex v. Brooke*, 2 T. R. 190. Where the House of Lords had voted the defendant guilty of a breach of privilege, and committed him to prison, the court of King's Bench refused to discharge him out of custody; *Rex v. Flower*, 8 T. R. 314. Where a man was charged with felony before three magistrates, who, upon hearing evidence, admitted him to bail, and afterwards, upon hearing additional evidence, committed him to prison, the court of K. B. held that he was not entitled to a habeas corpus to be discharged out of custody; *ex parte Allen*, 3 Nev. & Man. 35.

The court of King's bench may bail for any crime.

Let us next see, who may *not* be admitted to bail, or, what offences are *not*ailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners *convicted* of particular offences; for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given, *viz.* the body of the accused; in order to ensure that justice shall be done upon him, if guilty. Such persons therefore, as the author of the Mirror observes (*g*), have no other sureties but the four walls of the prison. By the ancient common law, before (*h*) and since (*i*) the Conquest, all felonies wereailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1, 3 Edw. I c. 15, takes away the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. VI. c. 9, and 1 and 2 Ph. and Mar. c. 13, give further regulations in this matter (*8*): and upon the whole we may collect (*k*), that

(*g*) C. 2, § 24.

(*h*) 2 Inst. 189.

(*i*) *In omnibus placitis de feloniam solet accusatus per plegios dimitti, præ-*

*terquam in placito de homicidio, ubi ad terrorem aliter statutum est.** (Glanv. 1. 14, c. 1.)

(*k*) 2 Inst. 186; 2 Hal. P. C. 129.

(8) These statutes are all repealed by the 7 Geo. IV. c. 64; by § 1 of which, reciting "that it is expedient to define under what circumstances persons may be admitted to bail in cases of felony, and to make better provision for taking examinations, bailments, and recognizances, and returning them to the proper tribunals; and that the technical strictness of criminal proceedings may in many instances be relaxed, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence; and that the administration of justice

in England may in other respects be rendered more effectual:" it is enacted, "that where any person shall be taken on a charge of felony, or suspicion of felony, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall, in the opinion of the justice or justices, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices, in the manner thereafter men-

* See post 299.

no justice of the peace can bail, 1. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another: 5. Persons outlawed: 6. Such as have abjured the realm: 7. *Approvers, [*299] of whom we shall speak in a subsequent chapter, and persons by them accused: 8. Persons taken with the mainour, or in

tioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt, nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody, until he or she shall be taken before two justices at the least; and where any person so taken, or any person in the first instance taken before two justices, shall be charged with felony, or on suspicion of felony, and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her committal, or such evidence shall be adduced on behalf of the person charged, as shall in their opinion weaken the presumption of his or her guilt, but there shall notwithstanding appear to them, in either of such cases, to be sufficient ground for judicial inquiry into his or her guilt, the person charged shall be admitted to bail, by such two justices in the manner hereinafter mentioned; provided always, that nothing therein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same." It will be seen from this enactment, that one justice is not empowered to take bail on a charge of felony, or suspicion of felony. The propriety of

the provision with respect to hearing evidence on behalf of the accused, seems at least questionable, for it appears difficult to imagine any case in which it would not be conducive to the ends of justice for the magistrate to hear such evidence, if the prisoner tendered it.

By statute 5 & 6 W. IV. c. 38, § 3, reciting that in many cases the taking bail for the appearance of persons charged with felony may be safely admitted without endangering the appearance of such persons to take their trial in due course of law, and that it is therefore expedient in such cases to amend and extend the provisions in that respect of an Act (7 Geo. IV. c. 64, above cited); it is enacted, "that it shall be lawful for any two justices of the peace, if they shall think fit, of whom one or other shall have signed the warrant of commitment, to admit any person or persons charged with felony, or against whom any warrant of commitment for felony is signed, to bail, in the manner and according to the provisions directed by the said recited Act (7 Geo. IV. c. 64), in such sum or sums of money, and with such surety or sureties as they shall think fit; and notwithstanding such person or persons shall have confessed the matter laid to his or their charge, or notwithstanding such justices shall not think that such charge is groundless, or shall think that the circumstances are such as to raise a presumption of guilt."

the fact of felony: 9. Persons charged with arson: 10. Excommunicated persons, taken by writ *de excommunicato capiendo*: all which are clearly not admissible to bail by the justices. Others are of a dubious nature, as, 11. Thieves openly defamed and known: 12. Persons charged with other felonies, or manifest and enormous offences, not being of good fame: and, 13. Accessories to felony, that labour under the same want of reputation. These seem to be in the discretion of the justices, whetherailable or not. The last class are such as *must* be bailed upon offering sufficient surety; as, 14. Persons of good fame, charged with a bare suspicion of manslaughter, or other inferior homicide: 15. Such persons, being charged with petit larceny, or any felony not before specified: or, 16. With being accessory to any felony. Lastly, it is agreed that the court (*l*) of King's Bench, or any judge (*m*) thereof in time of vacation, may bail for any crime whatsoever, be it treason (*n*), murder (*o*), or any other offence, according to the circumstances of the case (9). And herein

(*l*) 2 Inst. 189; Latch. 12; Vaugh. 157; Comb. 111, 298; 1 Comyns Dig. 495.

(*m*) Skin. 683; Salk. 105; Stra. 911; 1 Comyns Dig. 497.

(*n*) In the reign of Queen Elizabeth it was the unanimous opinion of the judges, that no court could bail upon a commitment, for a charge of high treason by any of the Queen's privy council. (1 Anders. 298.)

(*o*) *In omnibus placitis de felonis solet accusatus per plegios dimitti, præ-*

terquam, in placito de homicidio. (Glan. l. 14, c. 1.) *Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regis potestatis beneficio.* (Ibid. c. 3.)—"In all charges of felony, the party may be released upon bail except in a charge of homicide. Wherein for the purposes of terror it is otherwise: but in such charges, it is to be observed, that it is not usual to bail the accused, except by the exercise of the royal prerogative."

(9) But this power is to be exercised in the discretion of the court, and none can claim its benefits *de jure*. And it is not usual for this court to bail in cases of felony, unless when, in consequence of the defect of the commitment, and of the examination and depositions, it appears doubtful whether any offence has been committed. And, however defectively the mittimus may have been framed, yet, if from the depositions the court can collect that a felony has been committed, they will not bail the prisoner, but remand him

upon a special rule; 1 Chit. Cr. L. 98, 9. Thus the court of King's Bench will not grant even a rule nisi to remove the depositions taken before a coroner, and to bail a party charged upon a coroner's inquisition with manslaughter, without an affidavit of what took place before the coroner; *Rex v. Mills*, 4 Nev. & Man. 6. So, the judges at the Central Criminal Court, (vide ante, 269, note (16)), after postponement till the next session, on motion for the prosecution, of the presentation of a bill for a capital offence,

the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes, would greatly tend to elude the public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case: except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either House of Parliament, so long as the *session lasts; or such as are committed for contempts by any of the king's superior courts of justice (p).

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Upon the whole, if the offence be notailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice, or warrant under his hand and seal, containing the cause of his commitment: there to abide till delivered by due course of law (q). But this imprisonment, as has been said, is only for safe custody, and not for punishment (10): therefore, in this dubious interval

Commitment before conviction is for safe custody only; prisoners so committed are to be treated with the utmost humanity.

(p) Staundf. P. C. 73, b.

(q) 2 Hal. P. C. 122.

refused, on motion for the prisoner, to read over very long depositions, to enable them to decide whether they would admit him to bail, although the application was made on the ground that there was not sufficient time to prepare proper affidavits before the breaking up of the court; *Rex v. Palmer*, 6 C. & P. 654.

On bills found at that court for misdemeanors, forty-eight hours' notice of bail is necessary, unless the application is made on a Friday, with a view of detaining the party in custody over Sunday; *Rex v. Carlile*, 6 C. & P. 628. So, where a party, against whom a true bill for *perjury* had been found and the lord chief justice's warrant had issued, had been arrested in *Belgium* and brought in custody to England, and there, being unable to find bail, had been committed by the lord chief justice for trial, the court refused to discharge her out of custody on motion; saying, that as the party was charged

with a serious misdemeanor on the oath of a grand jury, and could not find bail, it was the duty of the court to take care that she should be rendered amenable to justice, which they could only do by continuing her in custody; and that under such circumstances they would not consider *how* or *where* the arrest was made, or whether it was legal or not; *ex parte Susannah Scott*, 4 M. & R. 361; 9 B. & C. 446; per Lord Tenterden, C. J., and Parke, J.; *absente Bayley, J.*; dissentiente Little-dale, J. And see *Rex v. Marks*, 3 East, 157; *ex parte Krans*, 2 D. & R. 411; 1 B. & C. 258.

(10) Otherwise it must be for a time certain; for, where a defendant was committed by two justices for a contempt towards them in their office, "until discharged by due course of law," the court of King's Bench held that the commitment was bad; *Rex v. James*, 1 D. & R. 559; 5 B. & A. 894.

between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only; though, what are so requisite, must too often be left to the discretion of the gaolers; who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation. Yet the law, as formerly held, would not justify them in fettering a prisoner, unless where he was unruly, or had attempted to escape (*r*) (11): this being the humane language of our ancient lawgivers (*s*), "*custodes pœnam sibi commissorum non augeant, nec eos torqueant; sed omni sævitiâ remotâ, pietateque adhibitâ, judicia debitè exequantur* (12) (13)."

() 2 Inst. 381 ; 3 Inst. 34.

(*s*) Flet. l. 1, c. 26.

(11) A constable has no right to handcuff a prisoner whom he has taken into custody on suspicion of felony, unless he has attempted to escape, or it is necessary in order to prevent his escaping; *Wright v. Court*, 6 D. & R. 623.

(12) Gaolers must not aggravate the punishment of those committed to their custody, nor apply any species of torture to them; but avoiding all cruelty, and exercising justice, precisely inflict the sentence; see 2 Chetw. Burn, 704, 5, *in notis*.

(13) As regards the power of commitment in particular cases, the following decisions seem to deserve notice:

A justice of peace may commit a feme covert, who is a material witness upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance; *Bennett v. Watson*, 3 M. & S. 1.

In some counties where a child is a witness in a prosecution, and has no

one who will enter into a recognizance for his or her appearance at the trial, the practice is for the constable or police officer to enter into a recognizance for the child's appearance, and to take the child to the assizes, he being allowed the expense of the child's travelling, &c.: and, in such a case, where a child was taken away, and the constable could not bring her to the assizes, the judge respited the constable's recognizance, that he might bring the child to the next assizes; 1 Har. Dig. 833.

Where the magistrates of a borough had exclusive jurisdiction within the borough, but concurrent jurisdiction with the county magistrates over the liberties of the borough, it was held, that, for offences committed within the liberties, they might commit to the county gaol, and try the prisoners at the borough sessions; *Rex v. Masson*, 9 D. & R. 172.

CHAPTER XXIII.

OF THE SEVERAL MODES OF PROSECUTION.

THE next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former way is either by *presentment*, or *indictment*.

I. A presentment, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation (*a*), without any bill of indictment laid before them at the suit of the king. As, the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment (*b*), before the party presented can be put to answer it (1). An inquisition of office is the act of a jury, summoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and

Of the several modes of prosecution, as,

1. Presentment, which may be by grand jury, as of nuisances, &c.; by coroner's jury, as of *felo de se*, &c.; by the sheriff's tourn, or court-leet, as of various petty offences;

(*a*) Lamb. Eirenarch, l. 4, c. 5.

(*b*) 2 Inst. 739.

(1) A constable, also, may present offences, of his own knowledge, but his presentments, for any offence, whether at assizes or sessions, must be made on oath, before a grand jury; *Rex v. Justices of Somersetshire*, 1 M. & R. 272. As to what offences he may present, Ritson, in his *Office of Constable*, p. 62, says, "the constable should present all offences within his own knowledge which concern the peace, as defaults of watching, disorderly houses, affrays, &c., at the leet, town, or quarter sessions. And such presentment is

as available as one made by twelve men; Dalt. 474; Fitz. 6. But he is not obliged to present a highway, sworn before him by two witnesses to be out of repair, even though demanded so to do by the quarter sessions; and may tell them plainly that he will not present it; 1 Ventr. 336." And now, by the new Highway Act, 5 & 6 W. IV. c. 50, the proceeding by presentment for the non-repair of highways is entirely abolished, and a summary mode of proceeding before magistrates substituted. See Bateman's edition, 72, 80.

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therefore the inquest, or jury, ought to hear all that can be alleged on both sides. Of this nature all are inquisitions of *felo de se*; of flight in persons accused of felony; of deodands, and the like; and presentments of petty offences in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined; as particularly the coroner's *inquisition of the death of a man, when it finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it (2); which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will, therefore, inquire a little more minutely.

II. Indictment, which must be preferred to and presented by the grand jury upon oath,

II. An *indictment* (c) is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer and terminer*, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them (d). They ought to be freeholders, but to what amount is uncertain (e); which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now settled by several acts of parliament (3). However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon

(c) See Appendix, § 1.

(e) Ibid. 155.

(d) 2 Hal. P. C. 154.

(2) It seems to be the better opinion, that *any* finding by a coroner's inquisition may be traversed; see Jervis on Coroners, 282 *et seq.*, where the authorities upon the subject are collected and considered.

(3) The qualification of grand jurors "in courts of sessions of the peace," is defined by 6 Geo. IV. c. 50, § 1, for which see post, 350, *in notis*. A grand

juror who has assisted in finding a true bill against a person indicted of felony or trespass, cannot sit upon the petty jury to try the same person; see 25 Edw. III. st. 5, c. 3. As to the qualifications of grand jurors generally, and other matters relating to the same subject, see 1 Chit. Cr. L. c. 6; Collyer's Cr. St. 282.

the grand jury, to the amount of twelve at the least, and not more than twenty-three, that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described, so early as the laws of king Ethelred (*f*). “*Exeant seniores duodecim thani, et præfectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolit ullum innocentem accusare, nec aliquem noxium celare* (4).” In the time of king Richard the first, according to Hoveden, the process of electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably *found too large and inconvenient; but the traces of this institution still remain, in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine, that might be applied to very oppressive purposes (*g*) (5).

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(*f*) Wilk. LL. Angl. Sax. 117.(*g*) State Trials, iv. 183.

(4) The twelve senior shall go out, and their foreman with them, and shall swear upon the Holy Gospel, which is placed in their hands, that they will not accuse any innocent, or conceal any guilty, man.

(5) Upon an indictment for high treason against the Earl of Shaftesbury

in the year 1681, the evidence was given in public before the grand jury at the Old Bailey; and the gentlemen of the jury expressing some doubts with regard to the legality of the proceeding, Lord C. J. Pemberton, and C. J. North both declared that it had always been the practice to examine the wit-

whose jurisdiction is limited to their own county.

The grand jury are sworn to inquire, only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by act of parliament. And to so high a nicety was this matter anciently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them: but by statute 2 and 3 Edw. VI. c. 24, he is now indictable in the county where the party died. And, by statute 2 Geo. II. c. 21, if the stroke or poisoning be in England, and the death upon the sea or out of England; or, *vice versâ*; the offenders and their accessaries may be indicted in the county where either the death, poisoning, or stroke shall happen. And so in some other cases: as particularly, where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII. c. 13; 33 Hen. VIII. c. 23; 35 Hen. VIII. c. 2, and 5 and 6 Edw. VI. c. 11. And counterfeiters, washers, or minishers

[*304] *of the current coin, together with all manner of felons and their accessaries, may, by statute 26 Hen. VIII. c. 6, confirmed and explained by 34 and 35 Hen. VIII. c. 26, § 75, 76, be indicted and tried for those offences, if committed in any part (*h*) of Wales, before the justices of gaol delivery and of the peace in the next adjoining county of England, where the king's writ runneth: that is, at present in the county of Hereford or Salop; and not, as it should seem, in the county of Chester or Monmouth: the one being a county palatine where the king's writ did not run, and the other a part of Wales, in 26 Hen. VIII. (*i*). Murders also, whether committed in England or in foreign parts (*k*), may by virtue of the statute 33 Hen. VIII. c. 23, be inquired of and tried by the king's special commission in any shire or place in the kingdom. By stat. 10 and 11 W. III. c. 25, all robberies and

(*h*) Stra. 533; 8 Mod. 134.

(*i*) See Hardr. 66.

(*k*) Ely's case, at the Old Bailey, Dec. 1720; Roache's case, Dec. 1775.

nesses publicly before the grand jury, whenever it had been requested by those who prosecuted for the king; 3

Harg. St. Tr. 417. But I apprehend this is the last instance of such a procedure.—CH.

other capital crimes, committed in Newfoundland, may be inquired of and tried in any county in England. Offences against the Black Act, 9 Geo. I. c. 22, may be inquired of and tried in any county of England, at the option of the prosecutor (*l*). So felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may, by statutes 8 Geo. II. c. 20, and 13 Geo. III. c. 84, be inquired of and tried in any adjacent county. By statute 26 Geo. II. c. 19, plundering or stealing from any vessel in distress or wrecked, or breaking any ship contrary to 12 Ann. st. 2, c. 18, (*m*), may be prosecuted either in the county where the fact is committed, or in any county next adjoining; and, if committed in Wales, then in the next adjoining English county: by which is understood to be meant such English county as, by the statute 26 Hen. VIII. above mentioned, had before a concurrent jurisdiction with the great sessions of felonies committed in Wales (*n*). Felonies committed out of the realm, in burning or destroying the king's ships, *magazines, or stores, may, by statute 12 Geo. III. c. 24, be inquired of and tried in any county of England, or in the place where the offence is committed. By statute 13 Geo. III. c. 63, misdemeanors committed in India may be tried upon information or indictment in the court of King's Bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court. But, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet, if larceny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both (*o*). Or, he may be indicted in England for larceny in Scotland, and carrying the goods with him into England, or *vice versa*; or for receiving in one part of the united kingdom goods that have been stolen in another (*p*). But for robbery, burglary, and the like, he can only be indicted where the fact was actually com-

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(*l*) So held by all the judges, H. 11 Geo. III. in the case of Richard Morris on a case referred from the Old Bailey.

(*m*) See page 245.

(*n*) At Shrewsbury summer assizes, 1774, Parry and Roberts were convicted of plundering a vessel which was

wrecked on the coast of Anglesey. It was moved in arrest of judgment, that Chester and not Salop was the next adjoining English county. But all the judges, (in Mich. 15 Geo. III.,) held the prosecution to be regular.

(*o*) 1 Hal. P. C. 507.

(*p*) Stat. 13 Geo. III. c. 31.

mitted: for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction. And if a person be indicted in one county for larceny of goods originally taken in another, and be thereof convicted or stands mute, he shall not be admitted to his clergy; provided the original taking be attended with such circumstances as would have ousted him of his clergy by virtue of any statute made previous to the year 1691 (q) (6).

(q) Stat. 25 Hen. VIII c. 3; 3 W. & M. c. 9.

(6) The law respecting venue in criminal prosecutions has been recently revised and simplified, and is now as follows:—

As to murder. By 9 Geo. IV. c. 31, § 7, if any British subject shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, committed on land out of the united kingdom, whether within the king's dominions or without, any justice of the county or place where the person so charged shall be, may take cognizance of the charge, and proceed therein as if it had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail, a commission shall be directed to such persons and into such county or place as shall be appointed by the lord chancellor, for the speedy trial of any such offender; and such persons shall have power to hear and determine all such offences, within the county or place limited in their commission by a jury of such county or place, in the same manner as if the offences had been actually committed in such county or place: and by § 8, where any person being feloniously struck, poisoned, or hurt, upon the sea, or at any place out of England, shall die of such stroke, &c. in England, or *vice versa*, every offence

committed in respect of any such case, whether the same shall amount to the offence of murder, or manslaughter, or being accessory before the fact to murder, or after the fact to murder or manslaughter, may be tried and punished in the county or place in England in which such death, stroke, &c. shall happen, in the same manner, in all respects, as if such offence had been wholly committed in that county or place.

The 2 & 3 Edw. VI. c. 24, which relates to the trial of murder, where the stroke or poisoning is in one county, and the death in another, being wholly repealed by the 7 Geo. IV. c. 64, and no similar provision being *expressly* re-enacted, a question arises whether murder is within the 7 Geo. IV. c. 64, § 12, which provides that *any felony* begun in one county and completed in another, may be tried in either. If the latter provision does not comprehend murder, there seems to be the same difficulty respecting the trial in such cases, as there was at the common law. Different opinions have been expressed upon the point; see Car. C. L. 19; Collyer's Cr. St. 254, note. It is said that where the *causa causans* occurs in one county, and the death happens in another, the coroner of the latter county shall proceed to take the inquisition; Jervis on Coroners, 51. And, upon the whole, it seems justifiable to assume

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to in-

Twelve of the grand jury, at least must con-

that, in such cases, the murder may be tried in either county; vide *ante*, 196, note (33).

As to offences committed on the borders of counties. By 7 Geo. IV. c. 64, § 12, where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within 500 yards thereof, or shall be begun in one county and completed in another, every such felony or misdemeanor may be tried and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein.

As to offences committed on persons or property in coaches or vessels. By 7 Geo. IV. c. 64, § 13, where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever, employed in any journey, or on board any vessel whatever employed on any voyage upon any inland navigation, such felony or misdemeanor may be tried and punished in any county through any part whereof such coach, &c., or vessel, shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and where any part of any highway or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be tried and punished in either of the said counties through, or adjoining to, or by the boundary of any part whereof such coach, &c., or vessel, shall have passed, in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county.

As to larceny generally. By the

Larceny Act, 7 & 8 Geo. IV. c. 29, § 76, if any person having feloniously taken any property in any one part of the united kingdom, shall afterwards have it in his possession in any other part, he may be indicted for larceny in that part where he shall so have such property in his possession, as if he had actually stolen it there: and any person having knowingly received, in any one part of the united kingdom, any stolen property, which shall have been stolen in any other part, may be indicted for such offence in that part where he shall so receive such property, as if it had been originally stolen in that part.

As to accessories. By 7 Geo. IV. c. 64, § 9, accessories before the fact to any felony, may be tried in any court that has jurisdiction to try the principal offender, although the offence of such accessories may be committed on the high seas, or on land, within or without the king's dominions: and if the principal offence is committed in one county, and the other offence in another, such accessories may be tried in either; and by sect. 10, a similar provision is made with respect to accessories after the fact to felony. See this section set out in full, *ante*, 40, n. (13). This repeals the 43 Geo. III. c. 113, § 5. See further as to the venue in indictments of offences committed on the high seas, *ante*, 269, note (15).

As to treasons. By 35 Hen. VIII. c. 2 (which is not repealed by 1 & 2 P. & M. c. 10, see 1 East, P. C. 103), all treasons or misprisions of treason committed out of the realm, may be tried in the court of King's Bench, by a jury of the county in which the court sits, or by a special commission in any county of England; see 1 Chit. Cr. L. 188.

An indictment for bigamy may, by 9 Geo. IV. c. 31, § 22, be tried in the

cur to find a true bill.

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dorse on the back of the bill, "*ignoramus*:" or, we know nothing of it; intimating that, though the facts might possibly be true, that truth did not appear to them: but now, they assert, in English, more absolutely "not a true bill;" or (which is the better way) "not found;" and then the party is discharged without further answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then *indorse upon it, "a true bill;" anciently, "*billa vera*." The indictment is then said to be found, and the party stands indicted. But, to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, by twelve, at least, of the grand jury, in the first place, assenting to the accusation; and, afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree (*r*). And the indictment, when so found, is publicly delivered into court.

The indictment must be clear and certain, as to the name and description of the offender: the time and

Indictments must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5, all indictments must set forth the Christian name, surname, and addition of the state and degree, mystery, town or place, and the county, of the offender, and all this to identify his *person* (7). The *time* and *place*

(*r*) 2 Hal. P. C. 161.

county where the offender is apprehended, or is in custody, the same as if the offence had been actually committed there.

In an indictment for a libel the venue must be laid in the county where the publication took place.

Indictments for offences against the customs and excise may be tried in any county of England; see the recent statute of 3 & 4 W. IV. c. 53, §§ 77, 122; Cro. Cir. Comp. 456-7.

Offences committed in a county of a city or town, may be tried in the county at large; see 38 Geo. III. c. 52; 51 Geo. III. c. 100; 60 Geo. III. c. 4; 1 Geo. IV. c. 4. If the indictment

states the felony to have been committed in the county at large, and it was committed in the county of a city or town, this is bad; *Rex v. Mellor*, R. & R. C. C. 144. But if the offence be properly laid in the county of a town, and the indictment is preferred in the county at large, it need not be averred that that is the next adjoining county to the county of the town; *Rex v. Goff*, id. 179. The 26 Hen. VIII. c. 6, § 6, which makes felonies in Wales triable in the next English county, extends to felonies created since that statute; *Rex v. Wyndham*, id. 197.

(7) The indictments mentioned in this statute are those "in which the

are also to be ascertained, by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as part of the description of the fact (s) (8). But sometimes the *time* may be very material, where there is any limitation in point of time

place of the fact done; the nature of the offence; and the value of the instrument, &c. concerned.

(s) 2 Hawk. P. C. 435.

exigent shall be awarded," shewing that it extends only to cases in which process of outlawry may be had; see Cro. Eliz. 148. This statute extends, however, to a presentment before a coroner, which is to be taken as an indictment, and upon which outlawry lies; see 2 Leon. 200; Jervis on Coroners, 35, 37. If the name of a prisoner is unknown, and he refuse to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought before the jurors by the keeper of the prison, will be sufficient; *Rex v. —*, R. & R. C. C. 489. But an indictment against him as a person to the jurors unknown, without something to ascertain whom the grand jury meant to designate, is insufficient; *Id. Ibid.* An Indictment for conspiracy alleged that "at the court of quarter sessions holden, &c., an indictment against A. was preferred to and found by the grand jury:" held, that this allegation must be proved by a caption regularly drawn up of record, and that the minute-book kept by the clerk of the peace could not be received as evidence of the finding of the bill, though no record had been in fact drawn up; *Rex v. Smith*, 8 B. & C. 341. By the 7 Geo. IV. c. 64, § 19, "no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition, of the party offering such plea, if the court shall be satisfied

by affidavit, or otherwise, of the truth of such plea; but, in such case, the court shall forthwith cause the indictment or information to be amended, according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such plea had been pleaded." Such amendments may, it is presumed, be made, without the intervention of the grand jury, and the power to make them renders pleas of misnomer, or of want of addition, or of wrong addition, useless. But as the 1 Hen. V. c. 5, is not repealed, and the 7 Geo. IV. c. 64, § 19, does not cure error, it seems that a party outlawed by a wrong addition, may still take advantage of it, as error; see *Parker's case*, Comb. 184. Though, if the outlawry were reversed, the prisoner would still be called upon to plead to the indictment; see 2 Hawk. P. C. 665. So that it would be of little advantage to take the objection.

(8) By 7 Geo. IV. c. 64, § 20, "no judgment upon any indictment or information, for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved; nor for the omission of the words, 'as appears by the record,' or, 'with force and arms,' or, 'against the peace;' nor for the insertion of the words, 'against the form of the statute,' instead of, 'against the form of the statutes,' or *vice versa*; nor

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assigned for the prosecution of offenders: as by the statute 7 W. III. c. 3, which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned, (except an assassination designed or attempted on the person of the king,) unless the bill of indictment be found within three years after the offence committed (*t*): and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the *offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason the facts must be laid to be done, “treasonably, and against his allegiance;” anciently, “*proditorié et contra ligeantiæ suæ debitum* :” else the indictment is void. In indictments for murder, it is necessary to say that the party indicted “murdered,” not “killed” or “slew,” the other; which, till the late statute, was expressed in Latin by the word “*murdravit* (*u*).” In all indictments for felonies, the adverb “feloniously,” “*felonicé*,” must be used; and for burglaries also, “*burglariter*,” or in English, “burglariously :” and all these to ascertain the intent. In rapes, the word “*rapuit*,” or “ravished,” is necessary, and must not be expressed by any periphrasis; in order to render the

(*t*) Fost. 249.(*u*) See vol. III. page 321.

for that any person or persons mentioned in the indictment or information, is or are designated by a name of office, or other descriptive appellation, instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue, where the court shall appear by the in-

dictment or information to have had jurisdiction over the offence.” The objections enumerated in this clause are no longer available, either in arrest of judgment, or by writ of error, because it enacts that judgment shall not be *stayed*, which applies to motions in arrest of judgment; or *reversed*, which applies to writs of error. But, it seems, that any of these objections will still be available on demurrer, where the prisoner prays judgment in his favour, and if his demurrer is allowed, judgment is neither stayed nor reversed, but given in his favour. See further on this subject, Car. Cr. L. 46, *et seq.*, and the cases there cited.

crime certain. So in larcenies also, the words "*felonice cepit et asportavit*," "feloniously took and carried away," are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb, or the like, is absolutely cut off, there such description is impossible (*v*). Lastly, in indictments, the *value* of the thing, which is the subject or instrument of the offence, must sometimes be expressed (9). In indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny; and whether entitled or not to the benefit of clergy (10): in homicide of

(*v*) 5 Rep. 122.

(9) An indictment for stealing a sheep, or any other cattle, must lay it to be of some value, for, unless its value exceed twelve pence, the stealing it is not capital; *Rex v. Peel*, R. & R. C. C. 407. Where value is essential, and in the indictment it is ascribed to many articles collectively, the offence must be made out as to every one of the articles; for the grand jury have ascribed the value collectively; *Rex v. Forsyth*, id. 274. But an indictment for embezzling money, need not specify the exact sum embezzled; *Rex v. Carson*, id. 303. Though it ought to set out specifically some article of the property embezzled, and the evidence should support that statement; *Rex v. Furneaux*, id. 335; *Rex v. Tyers*, id. 402.

(10) There are some recent enactments, respecting indictments for larceny, which it seems important to notice here. By 7 Geo. IV. c. 64, § 14, "to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners," the property of partners may be laid in any one partner by name, and

another, or others. By sect. 15, property belonging to counties, &c., may be laid in the inhabitants, without naming them. By sect. 16, property ordered for the use of the poor of parishes, &c., may be laid in the overseers, without naming them; and materials, &c. for repairing highways, may be laid to be the property of the surveyor, without naming him. By sect. 17, property of turnpike trustees may be laid in the trustees, without naming them. And by § 18, property under commissioners of sewers may be laid in the commissioners, without naming them. By 7 & 8 Geo. IV. c. 29, § 21, in indictments for stealing records, &c., it is unnecessary to allege either that the article is the property of any person, or that it is of any value. By sect. 22, a similar provision is made respecting wills. By sect. 44, where the materials therein enumerated are fixed in any square, street, or other like place, it is unnecessary to allege them to be the property of any person. And by sect. 46, in indictments against tenants and lodgers for stealing property from houses or apartments let to them, the

all sorts it is necessary ; as the weapon with which it is committed is forfeited to the king as a deodand (11).

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The remaining methods of prosecution are without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these, by the common law, was when a thief was taken *with the mainour*, that is, with the thing stolen upon him *in manu*. For he might, when so detected *flagrante delicto*, be brought into court, arraigned, and tried, without indictment : as by the *Danish law he might be taken and hanged upon the spot, without accusation or trial (*w*). But this proceeding was taken away by several statutes in the reign of Edward the third (*x*) : though in Scotland a similar process remains to this day (*y*). So that the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of *information*.

III. Informations are, some jointly by the king and the subject, and some by the king only ; the former are upon penal statutes : the time for instituting these is limited.

III. Informations are of two sorts ; first, those which are partly at the suit of the king, and partly at that of a subject ; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer ; and are a sort of *qui tam* actions, (the nature of which was explained in a former volume (*z*), only carried on by a criminal instead of a civil process : upon which I shall, therefore, only observe that, by the statute 31 Eliz. c. 5, no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any

(*w*) Stiern. de jure Sueon. l. 3, c. 5.
(*x*) 2 Hal. P. C. 149.

(*y*) Lord Kayms, i. 331.
(*z*) See vol. III. page 162.

property may be laid either in the owner or person letting to hire. For the cases bearing upon this subject, see Car. Cr. L. 25, *et seq.* ; Col. Crim. Stat. 329 : and see a full and able summary of the law of larceny, id. 325, 343.

(11) The subject of indictments must not be entirely quitted without noticing the important statute of 9 Geo. IV. c. 15, which enacts that it shall be lawful for any court of oyer and terminer

and general gaol delivery, in England, Wales, and Ireland, to cause the record in any indictment or information for any *misdemeanor*, when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record, to be forthwith amended in such particular : and thereupon the trial shall proceed as if no such variance had appeared.

common informer after one year is expired since the commission of the offence; nor on behalf of the crown after the lapse of two years longer: nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence (12).

The informations that are exhibited in the name of the king alone, are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney general: secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the court of King's Bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public (13). The objects of the king's own prosecutions, filed *ex officio* by his own attorney general, are properly such *enormous misdemeanors (14), as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tri-

Informations in the name of the king only, are, *ex officio*, by his attorney general, or, by common informers.

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(12) A *qui tam* information for penalties under the game laws, is not an information within the meaning of the 48 Geo. III. c. 58, so as to entitle the plaintiff to enter an appearance and plea, when the defendant himself neglects to appear and plead; *Davies, qui tam v. Bint*, 5 D. & R. 353.

(13) Both these kinds of informations appear to stand on nearly the same footing at common law; and the distinctions between them seem to spring chiefly out of the statute 4 & 5 W. & M. c. 18, and the practice which has been adopted since the passing of that Act; see *post*, 312.

(14) An information will not lie, in any case, for treason, or felony. Informations are of two classes, those against private individuals, and those against magistrates. For the instances

in which informations against private individuals will lie, see *Collyer's Cr. St.*, 257, note; 1 Harrison's Dig. 869, *et seq.* With respect to informations against magistrates, see *ante*, 141, note (47); 284, note (5). Application for this latter species of information must be made promptly. The court refused an information against a justice of the peace, for alleged misconduct in his office, where it appeared that the supposed criminal acts took place more than a year before the application, although the prosecutor swore that the circumstances did not come within his knowledge until just before the motion; *Rex v. Bishop*, 2 D. & R. M. C. 65; 5 B. & A. 612. See the cases generally in 1 Harrison's Dig. 867, *et seq.*; *Collyer's Cr. St.*, 258, note.

bunal; which power, thus necessary, not only to the ease and safety, but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, wherein provision is wisely made for the due preservation of all its parts. The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross or notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind (*a*), not peculiarly tending to disturb the government, (for those are left to the care of the attorney general,) but which, on account of their magnitude or pernicious example, deserve the most public animadversion. And when an information is filed, either thus, or by the attorney general *ex officio*, it must be tried by a petit jury of the county where the offence arises: after which, if the defendant be found guilty, the court must be resorted to for his punishment (15).

Ex officio informations are coeval with the common law: are confined to

There can be no doubt but that this mode of prosecution, by information, (or suggestion,) filed on record by the king's attorney general, or by his coroner or master of the crown-

(*a*) 2 Hawk. P. C. 260.

(15) If an information, or an indictment for a misdemeanor removed into the court of King's Bench by *certiorari*, be not of such importance as to be tried at the bar of the court, it is sent down by writ of *nisi prius* into the county where the crime is charged to have been committed, and it is there tried either by a common or a special jury, like a record in a civil action; and if the defendant is found guilty, he must afterwards receive judgment from the court of King's Bench. But, where an indictment for treason or felony is removed by *certiorari*, the law upon the subject seems to be fully stated by lord Hale in the two following sections; 2 P. C. 41.

"As to an indictment of felony or treason removed out of the county by *certiorari*, and the party pleading, the record is sent down by *nisi prius* to be tried; the judges of *nisi prius* may upon that record proceed to trial, and

judgment, and execution, as if they were justices of gaol delivery by virtue of the statute 14 Hen. VI. cap. 1.

"But if there were any question upon that statute, yet the statute of 6 Hen. VIII. cap. 6, which extends to all justices and commissioners, as well of gaol delivery as of the peace, enables the court of King's Bench to send to them the very record itself, and by a special writ or mandate to command them to proceed to trial and judgment, upon such issue joined; as they may command the justices, before whom the indictment was taken, to proceed to hear and determine the same, if no such issue were joined." See *Sir Myles Stapleton's case*, Raym. 376.

If the treason or felony is to be tried at *nisi prius* under the 14 Hen. VI. c. 1, then the court sends a transcript of the record, and not the record itself; 2 Hal. P. C. 3; 4 Co. 74.—CH.

office in the court of King's Bench is as ancient as the common law itself (*b*). For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was sufficient ground for instituting a criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanour, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any further intelligence, to convey that information to the court of King's Bench by a *suggestion on record, and to carry on the prosecution in his Majesty's name. But these informations, of every kind, are confined by the constitutional law to mere misdemeanours only; for, wherever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And, as to those offences, in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his Majesty's court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the statute 3 Hen. VII. c. 1, had extended the jurisdiction of the court of star-chamber, the members of which were the sole judges of the law, the fact, and the penalty; and when the statute 11 Hen. VII. c. 3, had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes or before the justices of the peace who were to hear and determine the same according to their own discretion; then it was, that the legal and orderly jurisdiction of the court of King's Bench fell into disuse and oblivion, and Empson and Dudley, (the wicked instruments of king Henry VII.) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices (*c*), continually harassed the subject and shamefully enriched the crown. The latter of these acts was soon, indeed, repealed by statute 1 Hen. VIII. c. 6, but the court of star-chamber

misdemeanors :
were once much
extended to the
oppression of
the subject by
the court of
star-chamber :

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(*b*) 1 Show. 118.

(*c*) 1 And. 157.

continued in high vigour, and daily increasing its authority, for more than a century longer: till finally abolished by statute 16 Car. I. c. 10.

since the abolition of which they have been regulated and restrained:

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Upon this dissolution the old common law (*d*) authority of the court of King's Bench, as the *custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in *practice (*e*). And it is observable, that, in the same Act of Parliament which abolished the court of star-chamber, a conviction by information is expressly reckoned up, as one of the legal modes of conviction of such persons as should offend a third time against the provisions of that statute (*f*). It is true, Sir Matthew Hale, who presided in this court soon after the time of such revival, is said (*g*) to have been no friend to this method of prosecution; and, if so, the reason of such his dislike was probably the ill use which the master of the crown-office then made of his authority, by permitting the subject to be harrassed with vexatious informations, whenever applied to by any malicious or revengeful prosecutor; rather than his doubt of their legality, or propriety upon urgent occasions (*h*). For the power of filing informations, without any controul, then resided in the breast of the master, and, being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of king William (*i*), to procure a declaration of their illegality by the judgment of the court of King's Bench. But Sir John Holt, who then presided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law and could not be then impeached. And, in a few years afterwards a more temperate remedy was applied in parliament, by statute 4 and 5 W. and M. c. 18, which enacts, that the clerk of the crown shall not file any information without express direction from the court of King's Bench; and that every prosecutor, permitted to promote such information, shall give security by a recognizance of twenty pounds

(*d*) 5 Mod. 464.

(*e*) Styl. Rep. 217, 245; Styl. pract. Reg. tit. Information, page 187, (edit. 1657,) 2 Sid. 71; 1 Sid. 152.

(*f*) Stat. 16 Car. I. c. 10, § 6.

(*g*) 5 Mod. 460.

(*h*) 1 Saund. 301; 1 Sid. 174.

(*i*) M. 1 W. & M. 5 Mod. 459; Comb. 141; Far. 361; 1 Show. 106.

(which now seems to be too small a sum) to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge, who tries the information, shall certify there was reasonable cause for filing it: and, at all events, to pay costs, unless *the information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other informations than those which are exhibited by the master of the crown-office; and, consequently, informations at the king's own suit, filed by his attorney general, are nowise restrained thereby. (16). [*312]

There is one species of informations, still further regulated by statute 9 Ann. c. 20, viz. those in the nature of a writ of *quo warranto*; which was shewn, in the preceding volume (k), to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights of

Informations by *quo warranto* now considered as merely civil proceedings.

(k) See vol. III. page 262.

(16) As the statute invests the court with a discretionary power to grant criminal informations, every motion for the rule nisi must be founded on satisfactory affidavits, disclosing all the facts of the case; and, in the case of libel, denying the charge, usually in the very words of the charge; *Rex v. Wright*, 2 Chit. R. 162. Such denial, however, upon oath, is not necessary where the charge is very general, and does not impute any particular acts of criminality to the party aggrieved, as where a man has been libelled generally as a thief; see Doug. 387; *Rex v. Williams*, 5 B. & A. 595; 1 D. & R. 197. As to the title of the affidavits at different stages of the proceedings, see 1 Chit. Cr. L. 858, and the cases there cited. When the rule nisi is obtained, a copy must be served on the defendant, and the original shewn to him; and before the rule can be made absolute, affidavit must be made of such service. If the rule be made absolute, the prosecutor must enter into the re-

cognizances required by the second section of the statute. He must also, by virtue of the same section, proceed to trial within a year after issue joined, or the defendant will be entitled to his costs. And if, after notice of trial given, the prosecutor neither countermands it in time, nor proceeds to trial, the costs must, by the course of the court, be paid to the defendant; 3 Burr. 1304. If the prosecutor neglects to apply for the judge's certificate at the trial at *nisi prius*, the court will have no discretion to refuse his costs to the defendant, even though the verdict was against the direction of the judge, and he certify, on terms, that it was contrary to evidence; 2 Stra. 1131. On the other hand, if the trial be at bar, the defendant can have no costs within the statute; see 2 Hawk. P. C. c. 26, § 10. Nor can any of the defendants, where some are acquitted, and others convicted; Collyer's Cr. St., 259, note. See fully on this subject, Cro. Cir. Comp. "Information."

such franchises ; though it is commenced in the same manner as other informations are, by leave of the court, or at the will of the attorney general : being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office ; yet usually considered at present as merely a civil proceeding (17).

These are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an *appeal* (18).

IV. Appeal.

IV. An appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word ; but it here means an original suit, at the time of its first commencement (l). An appeal therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime ; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. As this method of prosecution is still in force, I cannot omit to mention it : but as it is very little in use, on account of the *great nicety required in conducting it, I shall treat of it very briefly : referring the student for more particulars to other more voluminous compilations (m).

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This private process, for the punishment of public crimes, had probably its original in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offences. This was a custom derived to us, in common

(l) It is derived from the French, "*appeller*," the verb active, which signifies to call upon, summon, or challenge one ; and not the verb neuter,

which signifies the same as the ordinary sense of "appeal" in English.

(m) 2 Hawk. P. C. ch. 23.

(17) Because an information in the nature of a *quo warranto* is considered merely as a civil proceeding, the court of King's Bench will grant a new trial,

though the verdict should have been given for the defendant ; *Rex v. Francis*, 2 T. R. 484. *—CH.

(18) See *post*, 317, note (22).

* And see *Rex v. Phillips*, 1 Burr. 292 ; 1 Ld. Ken. 331, to the same point. But a *quo warranto* information cannot be quashed on motion,

though both parties consent ; *Rex v. Edgan*, and *Rex v. Brichell*, 4 Burr. 2297.

with other northern nations (*n*), from our ancestors, the ancient Germans; among whom, according to Tacitus (*o*), "*luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus* (*p*) (19). In the same manner by the Irish Brehon law, in case of murder, the brehon or judge was used to compound between the murderer and the friends of the deceased who prosecuted him, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompence which they called an *eriach* (*q*). And thus we find in our Saxon laws, particularly those of king Athelstan (*r*), the several weregilds for homicide established in progressive order, from the death of the ceorl or peasant, up to that of the king himself (*s*). And in the laws of king Henry I. (*t*), we have an account of what other offences were then redeemable by weregild, and what were not so (*u*). As therefore, during the continuance of this custom, a process was certainly given, for recovering the weregild by the party to whom it was due; it seems that, when *these offences by degrees grew no longer redeemable, the private process was still continued, in order to ensure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence. [*314]

But, though appeals were thus in the nature of prosecutions for some atrocious injury committed more immediately

(*n*) Stiernh. de jure Sueon. l. 3, c. 4.

(*o*) De M. G. c. 21.

(*p*) And in another place, (c. 12,) "*Delictis, pro modo pœnarum, equorum pecorumque numero convicti mulctantur. Pars muletæ regi vel civitati; pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.*"

(*q*) Spencer's State of Ireland, page 1513, edit. Hughes.

(*r*) Judic. Civit. Lund. Wilk. 71.

(*s*) The weregild of a ceorl was 266 thrysmas, that of the king 30,000; each thryasma being equal to about a shilling of our present money. The weregild of a subject was paid entirely

to the relations of the party slain; but that of the king was divided; one half being paid to the public, the other to the royal family.

(*t*) C. 12.

(*u*) In Turkey this principle is still carried so far, that even murder is never prosecuted by the officers of the government, as with us. It is the business of the next relations, and them only, to revenge the slaughter of their kinsmen: and if they rather chuse, as they generally do, to compound the matter for money, nothing more is said about it; (Lady M. W. Montague, Lett. 42.)

(19) Homicide is expiated by the gift of a certain number of cattle or sheep, which is received in satisfaction by the whole family of the deceased.

against an individual, yet it also was anciently permitted, that any subject might appeal another subject of high treason, either in the courts of common law (*w*), or in parliament, or for treasons committed beyond the seas, in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battle awarded in the court of Chivalry, on such an appeal of treason (*x*): but that in the first was *virtually* abolished (*y*) by the statutes 5 Edw. III. c. 9, and 25 Edw. III. c. 24, and in the second *expressly* by statute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of felony and mayhem.

An appeal of *felony* may be brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves are *larceny*, *rape*, and *arson*. And for these, as well as for mayhem, the persons robbed, ravished, maimed, or whose houses are burnt, may institute this private process. The only crime against one's relation, for which an appeal can be brought, is that of *killing* him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confined, by an ordinance of king Henry the first, to the four nearest degrees of blood (*z*). It is given to the wife, on account of the loss of her husband: therefore, if she marries again, before or pending her appeal, it is lost and gone; or, if she marries after judgment, she shall not demand execution. The heir, as was said, must also be heir male, and such a one as was the *next heir by the course of the common law, at the time of the killing of the ancestor. But this rule has three exceptions; 1. If the person killed leaves an innocent wife, she only, and not the heir, shall have the appeal: 2. If there be no wife, and the heir be accused of the murder, the person who next to him would have been heir male, shall bring the appeal; 3. If the wife kills her husband, the heir may appeal her of the death. And, by the statute of Gloucester, 6 Edw. I. c. 9, all appeals of death must be sued within a

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(*w*) Britt. c. 22.

page 112.)

(*x*) By Donald Lord Rae against David Ramsey; (Rushw. vol. 2, part 2,

(*y*) 1 Hal. P. C. 349.

(*z*) Mirr. c. 2, § 7.

year and a day after the completion of the felony by the death of the party: which seems to be only declaratory of the old common law; for in the Gothic constitutions we find the same "*præscriptio annalis, quæ currit adversus actorem, si de homicidia ei non constet intra annum a cæde facta, nec quinquam interea arguat et accuset* (a)."

These appeals may be brought, previous to any indictment; and if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offence. In like manner as by the old Gothic constitution, if any offender gained a verdict in his favour, when prosecuted by the party injured, he was also understood to be acquitted of any crown prosecution for the same offence (b): but, on the contrary, if he made his peace with the king, still he might be prosecuted at the suit of the party. And so, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, still he ought not, in strictness, to go at large, but be imprisoned or let to bail till the year and day be past, by virtue of the statute 3 Hen. VII. c. 1, in order to be forthcoming to answer any appeal for the same felony, not having as yet been punished for it: though, if he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed; for it is a maxim in law, that "*nemo bis punitur pro eodem delicto*." Before this statute was made, it was not usual to indict a man for homicide within the time limited for appeals; which produced very great inconvenience, of which more hereafter (c).

If the appellee be acquitted, the appellor, by virtue of the statute of Westm. 2, 13 Edw. I. c. 12, shall suffer one year's imprisonment, and pay a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he has sustained: and, if the appellor be incapable to make restitution, his abettors shall do it for him, and also be liable to imprisonment. This provision, as was foreseen by the author of Fleta (d), proved a great discouragement to appeals; so that thenceforward they ceased to be in common use.

If the appellee be found guilty, he shall suffer the same judgment, as if he had been convicted by indictment: but

(a) Stiernh. de jure Goth. l. 3, c. 4.

(b) Ibid. l. 1, c. 5.

(c) See page 335.

(d) L. 1, c. 34, § 48.

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with this remarkable difference; that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered on an action of battery (*e*). In like manner as, while the weregild continued to be paid as a fine for homicide, it could not be remitted by the king's authority (*f*). And the ancient usage was, so late as Henry the fourth's time, that all the relations of the slain should drag the appellee to the place of execution (*g*): a custom, founded upon that savage spirit of family resentment, which prevailed universally through Europe after the irruption of the northern nations, and is peculiarly attended to in their several codes of law; and which prevails even now among the wild and untutored inhabitants of America: as if the finger of nature had pointed it out to mankind, in their rude and uncultivated state (*h*). However, the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon may frustrate an indictment, so the appellant by his release may *discharge an appeal (*i*): "*nam quilibet potest renunciare juri pro se introducto*" (20) (21) (22).

(*e*) 2 Hawk. P. C. 392.

(*f*) LL. Edm. § 3.

(*g*) M. 11 Hen. IV. 12; 3 Inst. 131.

(*h*) Robertson, Cha. V. i. 45.

(*i*) 1 Hal. P. C. 9.

(20) For any man may renounce a law introduced for his own benefit.

(21) Some appeals of late years have been commenced, but not prosecuted with effect; 5 Burr. 2643. They have probably been compromised, as the chief object of an appeal in all times was to compel the defendant to make a pecuniary compensation. For when the verdict in an appeal was given in favour of the appellant, he might insist upon what terms he pleased as the ransom of the defendant's life, or a commutation of the sentence. In an appeal, in which the defendant was found guilty of manslaughter, it was doubted whether the king could pardon the burning in the hand, and the defendant compounded with the appellant

for forty marks; 3 P. Wms. 453.—CH.

(22) These appeals had become nearly obsolete, but the *right* still existing was claimed, and in part exercised, in the year 1818, by William Ashford, eldest brother and heir-at-law of Mary Ashford, who brought a writ of appeal against Abraham Thornton for the murder of his sister. Thornton had been tried at the Warwick Summer assizes, 1817, for the murder, and acquitted, though under circumstances of strong suspicion. The appellee, when called upon to plead, pleaded "not guilty, and that he was ready to defend himself by his body;" and taking his glove off, he threw it upon the floor of the court. A counterplea was afterwards delivered in by the appellant, to

These are the several methods of prosecution instituted by the laws of England for the punishment of offences; of which that by indictment is the most general. I shall therefore confine my subsequent observations principally to this method of prosecution; remarking by the way the most material variations that may arise, from the method of proceeding by either information or appeal.

which there was a replication. A general demurrer followed, and joinder thereon. See a full detail of the proceedings in that singular case, in the report of it, under the name of *Ashford v. Thornton*, 1 B. & A. 405. It was held in that case, that, where in an appeal of death, the appellee wages his battle, the counterplea, to oust him of this mode of trial, must disclose such violent and strong presumptions of guilt, as to leave no possible doubt in the minds of the court; and, therefore, that a counterplea, which only stated strong circumstances of suspicion, was insufficient. It was also held, that the appellee may reply fresh matter, tending to shew his innocence, as, an alibi, and his former acquittal of the same offence on an indictment. But it was doubted whether, when the counterplea is per se insufficient, or where the replication is a good answer to it, the court should give judgment that the appellee be allowed his wager of battle, or that he go without day. Therefore, the appellant praying no further judgment, the court, by consent of both parties, ordered that judgment should be stayed in the appeal, and that the appellee should be discharged. This case, the first of the kind that had occurred for more than half a century,

(see *Bigby v. Kennedy*, 5 Burr. 2643, 2 W. Bl. 713; *Rex v. Taylor*, 5 Burr. 2793; *Smith v. Taylor*, id. ibid; the last cases upon the subject, where the mode of proceeding is detailed at large,) led to the total abolition of appeals of murder, as well as of treason, felony, or other offences, together with wagers of battle, by the passing of the statute 59 G. III. c. 46. The case, therefore, is quoted merely on account of the intense interest it excited at the time, and for the purpose of better introducing the repealing statute. That statute is entitled, An Act to abolish appeals of murder, felony, treason, or other offences, and wager of battle, or joining issue and trial by battle, in writs of right, and enacts, that from and after the passing thereof, all appeals of treason, murder, felony, or other offences, shall cease, determine, and become void; and that it shall not be lawful for any person or persons, at any time after the passing of this Act, to commence, take, or sue appeals of treason, murder, felony, or other offences, against any other person or persons whomsoever, but that all such appeals shall from henceforth be utterly abolished, any law, statute, or usage to the contrary in anywise notwithstanding.

CHAPTER XXIV.

OF PROCESS UPON AN INDICTMENT.

Process,

WE are next in the fourth place, to inquire into the manner of issuing *process*, after indictment found, to bring in the accused to answer it. We have hitherto supposed the offender to be in custody before the finding of the indictment; in which case he is immediately, or as soon as convenience permits, to be arraigned thereon. But if he hath fled, or secretes himself, in capital cases; or hath not, in smaller misdemeanors, been bound over to appear at the assizes or sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the grand jury against it. And, if it be found, then process must issue to bring him into court; for the indictment cannot be tried, unless he personally appears: according to the rules of equity in all cases, and the express provision of statute 28 Edw. III. c. 3, in capital ones, that no man shall be put to death, without being brought to answer by due process of law. (1).

in misdemeanors, is by *venire facias*, distress infinite, and *capias*; in capital crimes by *capias* only; in both if the accused does not appear, by out-lawry.

The proper process on an indictment for any petty misdemeanor, or on a penal statute, is a writ of *venire facias*, which is in the nature of a summons to cause the party to appear. And if by the return to such *venire* it appears, that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then, upon his nonappearance, a writ of *capias* *shall issue, which commands the sheriff to take his body, and have him at the next assizes; and if he cannot be taken

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(1) Process is so denominated because it *proceeds* or issues forth in order to bring the defendant into court to answer the charge preferred against him, and signifies the writs or judicial means by which he is brought to an-

swer. That proceeding which is called a warrant before the finding of the bill, is termed process when issued after the indictment has been found by the jury; 1 Chit. Cr. L. 388.

upon the first *capias*, a second, and a third shall issue, called an *alias*, and a *pluries capias*. But, on indictments for treason or felony, a *capias* is the first process; and for treason or homicide, only one shall be allowed to issue (a), or two in the case of other felonies, by statute 25 Edw. III. c. 14, though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable (b) (2). And so, in the case of misdemeanors, it is now the usual practice for any judge of the court of King's Bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant (3). But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry: that is, he shall be exacted, proclaimed, or required to surrender, at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

The punishment, for outlawries upon indictments for mis-

(a) See Appendix § 1.

(b) 2 Hal. P. C. 195.

(2) But see the case of *Rex v. Yandall*, 4 T. R. 521, from which it appears that it is usual to issue three writs of *capias* in all cases.

(3) The statute 48 Geo. III. c. 58, enacts, that whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information, in his Majesty's court of King's Bench, not being treason or felony, and the same shall be made appear to any judge of the same court by affidavit or certificate, of an indictment or information being filed against such person in the said court for such offence, it shall and may be lawful for such judge to issue his warrant under his hand and seal, and thereby cause such person to be apprehended and brought

before him or some other judge of the same court, or before a justice of the peace, in order to his giving bail to such amount as shall be expressed in the warrant, and in neglect thereof, to commit such person for trial. Persons committed under this Act, neglecting to appear and plead to the indictment or information, (a copy of which is to be delivered eight days before they are required to appear and plead,) a provision is made for the prosecutors, after notice, to enter an appearance and plea for them, and such proceedings are to be thereupon had, as if the defendants had adopted these steps themselves. See 1 Chit. Cr. L. 339, and the authorities there collected on this subject.

Outlawry, in treason or felony is tantamount to conviction; it may be reversed by writ of error, and the party be let in to plead to an indictment.

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demesnors, is the same as for outlawries upon civil actions, of which, and the previous process by writs of *capias*, *exigi facias*, and *proclamation*, we spoke in the preceding book (c); viz. forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country (d) (4). His life is, however, still under the protection of the law, as hath formerly been *observed (e): so that though anciently an outlawed felon was said to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that should meet him (f); because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him: yet now, to avoid such inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder (g), unless it happens in the endeavour to apprehend him (h). For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of *capias utlagatum*, in order to bring him to execution. But such outlawry may be frequently reversed by writ of error; the proceedings therein being, as it is fit they should be, exceed-

(c) See vol. III. p. 283, 4.

(d) 2 Hal. P. C. 205.

(e) See page 178.

(f) Mirr. c. 4, § 4. Co. Litt. 128.

(g) 1 Hal. P. C. 497.

(h) Bracton, fol. 125.

(4) See 2 Rol. Abr. 306, pl. 40; Co. Litt. 128, b.; *Rex v. Earler*, Fort. 40; *Rex v. Simpson*, 10 Mod. 379. In all cases, consequently, of treason and felony, the outlawry gives the forfeiture of the lands of the outlaw, in the former cases to the king, in the latter to the lord of whom they are immediately held; 2 Hale, P. C. 206. And in cases of treason or murder, the outlawry works corruption of blood and forfeiture of dower. With regard to the goods of the party against whom an exigent has been awarded, upon an indictment for treason or felony, the very issuing of the writ makes them forfeit to the king, or to the lord of some franchise to whom that liberty is granted, from the time of the teste of the writ; 2 Hale,

P. C. 204. If, therefore, the writ of exigent be well awarded in the first instance, the goods will remain forfeit until the award of the exigent be reversed by special writ of error; for the reversal of the outlawry only, is not a reversal of the writ of exigent. In such case, therefore, the writ of error should be, *tam in adjudicatione brevis de exigi facias, quam in promulgatione utlagariæ*; 2 Hale, P. C. 205. When the defendant is outlawed, a writ of *capias utlagatum* may be awarded to take him into custody, and upon this process any doors may be broken to apprehend the outlaw; 1 Chit. Cr. L. 367; *Semayne's case*, 5 Co. Rep. 91; *Coll- yer's Cr. St.* 521, n.

ingly nice and circumstantial; and, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed; upon which reversal the party accused is admitted to plead to, and defend himself against, the indictment (5).

Thus much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of *certiorari facias* are usually had, though they may be had at any time before trial (6), to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of King's Bench (7); which is the sovereign ordinary court of justice in

The indictment may be removed by *certiorari* into the court of king's bench at any time before trial; *certiorari* may be granted either to the prosecutor or the defendant.

(5) Outlawry may be avoided or reversed at any time, from the very earliest stages of the process, even until the defendant has been taken upon the *capias utlagatum*. Nor is there any difference in this respect between civil and criminal cases; and it seems to be considered that the proceedings in outlawry generally, whether in indictments for felony, or in civil actions, have always been, and ought to be, regulated by the same rules: see *Bryan v. Wagstaffe*, 8 D. & R. 208; 5 B. & C. 314.

Therefore, it will be error, in criminal as well as civil cases, if the person outlawed was, at the time that outlawry was pronounced, within the age of discretion, that is, under the age of fourteen; Com. Dig. *Utlagary* (C. 1); or, if at the time the exigent was awarded, he was in prison, Litt. § 437; or out of the realm; *O'Kearney's case*, Skinner, 16. Nor will the circumstance of his departure, if before exigent awarded, for the express purpose of avoiding the consequences of the indictment, be a sufficient ground for preventing the reversal of an outlawry; *Bryan v. Wagstaffe*, 8 D. & R. 208; 5 B. & C. 314. Every outlawry determines upon the death of the party outlawed; see Tidd, 145. Therefore, in cases of felony, below the degree of treason or murder, a reversal of the outlawry by the heir for the death of his ancestor, will be followed by restitution of the forfeited

lands. As to what shall be sufficient evidence of the death of the ancestor, see Tidd, 146. Since the passing of the 7 Geo. IV. c. 64, § 9, the exigent against an accessory need not be stayed until outlawry of the principal; *Collyer's Cr. St.* 520. See generally upon this subject, *id.* Process, 511, 522; Tidd, *Outlawry*, 128, 146; Harrison's Dig. *Outlawry*, 1545; 1 Chit. Cr. L. Process, 347, 370; and the numerous cases there respectively collected.

(6) It seems that, strictly speaking, *certiorari* lies till judgment is given, and even after judgment, in cases where a writ of error does not lie; but that, in practice, it is seldom granted to remove an indictment after a conviction, unless for some special cause; and chiefly where no remedy is to be had by writ of error; see *Collyer's Cr. St.* 45, and the cases there collected.

(7) For the definition and history of the writ of *certiorari*, see Fitz. N. B. 554. As the court of King's Bench has a general superintendence over all other courts of criminal jurisdiction, so it may award a *certiorari* to remove proceedings from them, unless they are expressly exempted from such superintendence by the statutes creating them; 2 Hawk. P. C. 286; *Rex v. Young*, 2 T. R. 473; *Rex v. Jukes*, 8 T. R. 542. But *certiorari* cannot be taken away by any general, but only by express negative words; *Rex v. Reeve*,

causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of King's Bench, or before the justices of *nisi prius* (8): or 3. It is so removed, in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those *counties or places where the process of the inferior judges will not reach him (*i*). Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of King's Bench remands the record to the court below, to be there tried and determined (9). A *certiorari* may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discre-

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(i) 2 Hal. P. C. 210.

1 W. Bl. 231; and a statute, taking away *certiorari*, does not take it from the crown, unless expressly mentioned; *Rex v. —*, 2 Chit. R. 136; and see *Rex v. Tindal*, 15 East, 339, n. *Certiorari* lies from the court of King's Bench to justices, even in cases which they are empowered *finally* to hear and determine; 2 Hawk. P. C. 236; *Rex v. Morely*, 2 Burr. 1040; *Hartley v. Hooker*, Cowp. 524.

(8) The court of King's Bench refused to grant a *certiorari* to remove an indictment of murder from the Yorkshire assizes, in order to a trial at bar, or in another county, on the ground that the prisoners (who had pleaded to the indictment,) could not have a fair and impartial trial in the former county; *Rex v. Mead*, 3 D. & R. 301. The refusal, however, did not proceed upon any doubt of the *power* of the court to

grant the writ, but upon *discretionary* principles only, namely, that the effect of the removal would be to produce a delay in the administration of justice, and such an increase of expense as might oblige the prosecutors to abandon the prosecution; and that the application had been tardily made. In *Rex v. Thomas*, 4 M. & S. 442, a *certiorari* was granted, at the instance of the attorney general on behalf of a prisoner, to remove an indictment for murder from the sessions of the city of Rochester.

(9) The better opinion seems to be, that a *certiorari* being once delivered into court, makes all subsequent proceedings in the record to be removed by it erroneous. Yet, at the sessions, if it be not delivered before the jury are sworn, the justices may proceed; Collyer's Cr. St. 45.

tion (10) and therefore it is seldom granted to remove indictments from the justices of gaol delivery, or after issue joined or confession of the fact in any of the courts below (*k*) (11).

At this stage of prosecution also it is, that indictments found by the grand jury against a peer must in consequence of a writ of *certiorari* be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that in places of exclusive jurisdiction, as the two universities, indictments must be delivered, upon challenge and claim of cognizance, to the courts therein established by charter, and confirmed by Act of Parliament, to be there respectively tried and determined (12).

Cognizance must be claimed in places of exclusive jurisdiction before trial.

(*k*) 2 Hawk. P. C. 287; 4 Burr. 749.

(10) *Certiorari* is always granted of course upon the application of the crown; *Rex v. Eaton*, 2 T. R. 89. But not so when a defendant applies; he must lay some ground for it before the court, on affidavit; *id.* And now by statute 5 & 6 W. IV. c. 33, no writ of *certiorari* can be obtained, by any party, in any case, to remove an indictment from an inferior court into the Court of King's Bench, without motion made, and certain recognizances entered into.

(11) See *ante*, 320, note (6). *Certiorari* does not lie to remove an indictment for felony from the general sessions of oyer and terminer at Hicks's Hall, without the consent of the prosecutor; *Rex v. Kingston*, (Duchess,) Cowp. 283. But *certiorari* was granted to remove an indictment from the Old Bailey, where the defendant was a public officer, and lived at Gloucester; *Anon.* 1 Chit. R. 571, n. So, *certio-*

rari lies to remove an indictment from the Great Sessions in Wales; *Rex v. Griffith*, 3 T. R. 658.

The attorney general, upon motion, is entitled, as of course, to a *habeas corpus* and *certiorari*, to bring into the Court of King's Bench a prisoner, and the record of his conviction, in a case of felony; *Rex v. Garside*, 4 Nev. & Man. 33.

In a case of a conviction for murder, in which the prisoners were brought up by *habeas corpus*, and the record by *certiorari*, the court gave the prisoners three days' time to examine the record, and to instruct counsel to shew cause why execution should not be awarded against them; *id. ibid.*

And see further on this subject, 1 Harrison's Digest, *Certiorari*; Collyer's Cr. St. *Certiorari*; 1 Chit. Cr. L. 371, *et. seq.*

(12) Vide *ante*, 278, note (36).

CHAPTER XXV.

OF ARRAIGNMENT AND ITS INCIDENTS.

Of arraignment:

WHEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.

To arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment (a) (1). The prisoner is to be called to the bar by his name; and it is laid down in our ancient books (b), that though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's case, A. D. 1722, a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment (c) (2).

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which is a mode
of identifying
the prisoner:

When he is brought to the bar he is called upon by name to hold up his hand: which though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de personâ*, and he owns himself to be of that name by which he is called (d). However, it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowledgment

(a) 2 Hal. P. C. 216.

P. C. 78; 3 Inst. 34; Kel. 10; 2 Hal.

(b) Bract. l. 3, de Coron. c. 18,
§ 3; Mirr. c. 5, sect. 1, § 54; Flet.
l. 1, c. 31, § 1; Brit. c. 5; Staundf.

P. C. 219; 2 Hawk. P. C. 308.

(c) State Trials, vi. 230.

(d) 2 Hal. P. C. 219.

(1) This word in Latin (Lord Hale says) is no other than *ad rationem ponere*, and in French *ad reson*, or abbreviated *a resn*; 2 H. P. C. 216.—CH.

(2) In Waite's case, Leach, 34, it

was held, that the court has no authority to release the prisoner from his irons, till he has pleaded, and the jury are charged to try him.

will answer the purpose as well : therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient (e) (3).

Then the indictment is to be read to him distinctly in the English tongue, (which was law, even while all other proceedings were in Latin,) that he may fully understand his charge. After which it is to be demanded of him, whether he be guilty of the crime, whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attainted ; unless he chose it, for he might waive the benefit of the law : and therefore principal and accessory might, and may still, be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all, and stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned : for *non constitit* whether any felony was committed or no, till the principal was attainted ; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen, where it was possible that a trial of the principal might be had, subsequent to that of the accessory : and therefore the law still continues that the accessory shall not be tried, so long as the principal remains liable to be tried hereafter. But by statute *1 Ann. c. 9, if the principal be once convicted, and before attainder, that is, before he receives judgment of death or outlawry, he is delivered by pardon, the benefit of clergy, or otherwise ; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all ; in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attainted ; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit

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(e) Raym. 408.

(3) The ceremony of holding up the hand is not required in the case of a peer ; 4 St. Tr. 211, 508 ; and it seems that arraignments, generally, may be good without holding up the hand ; *Rex v. Ratcliffe*, 1 W. Bl. 3.

of justice (*f*), that the accessory is at liberty, if he can, to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law (4).

and incident to
which are,

When a criminal is arraigned, he either *stands mute*, or *confesses* the fact; which circumstances we may call *incidents* to the arraignment; or else he *pleads* to the indictment, which is to be considered as the next stage of proceedings. But first, let us observe these incidents to the arraignment, of standing mute, or confession.

I. Standing
mute, which is,
either by the vi-
sitation of God;

I. Regularly a prisoner is said to stand mute, when, being arraigned for treason or felony, he either, 1. Makes no answer at all: or, 2. Answers foreign to the purpose, or with such matter as is not allowable; and will not answer otherwise: or, 3. Upon having pleaded not guilty, refuses to put himself upon the country (*g*). If he says nothing, the court ought *ex officio* to empanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. If the latter appears to be the case, the judges of the court, who are to be of counsel for the prisoner, and to see that he hath law and justice, shall proceed to the trial, and examine all points as if he had pleaded not guilty (*h*) (5). But whe-

(*f*) Foster, 365, &c.

(*h*) 2 Hawk. P. C. 327.

(*g*) 2 Hal. P. C. 316.

(4) The law upon this subject has been greatly altered and improved of late. See *ante*, 305, note (5); 133, note (19); 39, note (12); and 38, note (8). See also the 7 Geo. IV. c. 64, by sect. 9, of which, accessories before the fact, whether in cases of felony at common law, or by virtue of any statute or statutes made or to be made, may be tried as such, or as for substantive felonies, by any court having jurisdiction to try the principal felons, although the offences be committed on the seas or abroad; and, if the offences be committed in different counties, may be tried in either.

By sect. 10, accessories after the fact may be tried by any court having jurisdiction over the principal felons, as in the preceding section; and, by sect. 11,

in order that all accessories may be convicted and punished, in cases where the principal felon is not attainted, it is enacted, that accessories may be prosecuted after the conviction of the principal felon, though the principal felon be not attainted. See further as to arraignment, 1 Curw. Hawk. P. C. 434; 1 Chit. Cr. L. 414. The statute mentioned in the text is repealed by the statute 7 Geo. IV. c. 64.

(5) By 7 & 8 Geo. IV. c. 28, § 1, where the prisoner pleads "not guilty," without more, he shall be put on his trial by jury; and by sect. 2, if he refuses to plead, the court may order a plea of "not guilty" to be entered, and proceed as in other cases. But the latter is discretionary; and where there is any real doubt whether the refusal to

ther judgment of death can be given against such a *prisoner, who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined (i).*

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(i) 2 Hal. P. C. 317.

plead arises from obstinacy or inability, the court may, and will, empanel a jury to try that question. In case of insanity, this is specially provided for by the unrepealed statute of 39 & 40 Geo. III. c. 94, § 1 of which enacts that the jury in case of any person charged with treason, &c., proving upon the trial to be insane, shall declare whether he was acquitted by them on account of insanity, and the court shall order him to be kept in custody till his Majesty's pleasure be known, and his Majesty may give an order for the safe custody of such insane person; and sect. 2 enacts, that insane persons, indicted for any offence, and found to be insane by a jury, to be empannelled on their arraignment, shall be ordered by the court to be kept in custody till his Majesty's pleasure be known. The latter section has been held to extend to cases of misdemeanor; *Rex v. Little*,

R. & R. C. C. 430.

In *Rex v. Roberts*, Car. Cr. L. 57, a prisoner would not plead, and a jury being empannelled to try whether he stood mute by the visitation of God, his counsel claimed a right to address the jury, as this was an issue with the affirmative on the prisoner. This was allowed by Park and Abbott, Js. The prisoner's counsel addressed the jury, and called witnesses to prove he was insane. The jury found that he was so, and Park J., directed that he should be detained until his Majesty's pleasure should be known.

Where a prisoner, on being arraigned, stated that he was deaf, on which the indictment was read over to him, and he apparently did not hear it, the judge directed a jury to be empannelled to try whether he stood mute by the act of God, or out of malice; *Rex v. Halton*, 1 R. & M. 78.

* If a person indicted for felony stand mute upon his arraignment, the court may direct the sheriff to return a jury instantanter, to try whether he stand mute obstinately, or by the visitation of God; and if they find that he stood obstinately mute, sentence may be passed without further inquiry; *Rex v. Messier*, 1 Leach, 183.

A prisoner mute by the visitation of God, may be arraigned, tried, sentenced, and transported; *Rex v. Steel*, 1 Leach, 451.

A prisoner, deaf and dumb from his birth, may be arraigned for a capital offence, if intelligence can be conveyed to him by signs or symbols; *Rex v. Jones*, 1 Leach, 102.

But the case of *Rex v. Esther Dyson*, will more particularly illustrate this subject, both as to the standing mute and as to the question of insanity.

We have before seen (*ante* 24) that

where an act, which under ordinary circumstances would be criminal, is committed during the prevalence of mental derangement, the party is excused in law, although, if he is of sound mind at the time of his trial, his previous insanity is not a bar to the trial, but is merely a ground of defence. So, on the other hand, if the party was sane at the time of the act committed, but was insane at the time of his arraignment, the trial must be postponed until he is able to plead to the indictment, and to comprehend the nature of the proceedings against him.

In the case last above mentioned the prisoner was placed at the bar, charged with the wilful murder of her own illegitimate infant child. It appeared that she was both deaf and dumb. The indictment having been read over to her, she was called upon to plead, but made no reply. A jury was then sworn to

or obstinately.

If he be found to be obstinately mute, which a prisoner hath been held to be, that hath cut out his own tongue (*k*), then, if it be on an indictment of high treason, it hath long been clearly settled, that standing mute is an equivalent to a conviction, and he shall receive the same judgment and execution (*l*). And as in this the highest crime, so also in the lowest species of felony, *viz.* in petit larceny, and in all misdemeanors, standing mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner was not, by the ancient law, looked upon as convicted, so as to receive judgment for the

(*k*) 3 Inst. 178.

(*l*) 2 Hawk. P. C. 329; 2 Hal. P. C. 332, 317.

try whether she stood mute of malice, or by the visitation of God. Upon this issue witnesses were examined, and the jury found that she stood mute by the visitation of God. The judge then assigned the prisoner counsel, and a witness was sworn to interpret her signs truly; and she signified by signs that "she did not do it," upon which a plea of "not guilty" was entered for her. After a variety of attempts, no means could be found to make her understand the nature of the proceedings against her, or her right to challenge the jury. The jury were next sworn to try whether she was then sane or not, and witnesses were examined as to whether they could make her understand the nature of the proceedings against her or not. After repeated attempts they said they could not; she could only understand natural objects and things she had seen before.

The judge then addressed the jury upon the issue. He said that the term "insane" was to be considered as meaning not merely "idiot" or "lunatic," but a state of mind in which, whether from natural causes or otherwise, the prisoner was then unable to understand the nature of the proceedings against her. Lord Hale says, a deaf and dumb person is, in presumption of law an idiot; but if he has the use of his understanding he may be tried, and suffer judgment and

execution, though great caution is to be used. The question is, whether or not the prisoner has sufficient capacity to conduct her defence with the advice and caution that she ought. If she cannot do that, she is in a worse state than any subject of this realm ought to be in when put upon trial. Upon this issue the jury found the prisoner "not now sane."

The judge then inquired whether it was possible to instruct the prisoner so as to make her understand the nature of the proceedings at a trial. The witnesses thought that might possibly be done by teaching her to read by means of the deaf and dumb alphabet, but that at her age it would require great labour and much time. His lordship then said he would consult his learned brother in the other court (Mr. Justice Littledale), and they would determine whether the prisoner should be instructed, with a view to her being tried at a subsequent period, or delivered to his Majesty, to be detained under the provisions of the 39 & 40 Geo. III., relating to the custody of insane criminals, and the trial was thereupon respited, and the judges were of opinion that the course prescribed by the 39 & 40 Geo. III. should be pursued; *Rex v. Esther Dyson*, Cor. Parke, J., York, Sp. Ass. 1831; Matth. Dig. 410; Cro. Cir. Comp. 489.

felony ; but should, for his obstinacy, have received the terrible sentence of *penance*, or *peine* (which, as will appear presently, was probably nothing more than a corrupted abbreviation of *prisone*) *forte et dure*.

Before this was pronounced the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger (*m*): and, after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed him, even though he was too stubborn to pray it (*n*). Thus tender was the law of inflicting this dreadful punishment: but if no other means could prevail, and the prisoner, when charged with a capital felony, continued stubbornly mute, the judgment was then given against him, without any distinction of sex or degree. A judgment which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution (6).

The rack, or question, to extort a confession from criminals, is a practice of a different nature: *this* having been only *used to compel a man to put himself upon his trial; *that* being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk, and other ministers of

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(*m*) 2 Hal. P. C. 320.

(*n*) 2 Hal. P. C. 321; 2 Hawk. P. C. 332.

(6) Aulus Gellius with more truth hath made the same observation upon the cruel law of the Twelve Tables *De inope debitore secundo*, "*Eo consilio tanta immanitas pœnæ denunciata est, ne ad eam unquam perveniretur*;" for he adds, "*dissectum esse antiquitus neminem equidem neque legi neque audivi*:" lib. 20, c. 1. But with respect to the horrid judgment of the *peine forte et dure*, the prosecutor and the court could exercise no discretion or shew no favour to a prisoner, who stood obstinately mute. And in the legal history of this country there are numerous instances of persons, who had resolution and patience to undergo so terrible a death, in order to benefit their heirs by preventing a forfeiture of their estates, which would have been

the consequence of a conviction by a verdict.

There is a memorable story of an ancestor of an ancient family in the north of England: In a fit of jealousy he killed his wife; and put to death his children who were at home, by throwing them from the battlements of his castle; and proceeding with an intent to destroy his only remaining child, an infant nursed at a farm-house at some distance, he was intercepted by a storm of thunder and lightning. This awakened in his breast the compunctions of conscience. He desisted from his purpose, and having surrendered himself to justice, in order to secure his estates to this child, he had the resolution to die under the dreadful judgment of *peine forte et dure*.—CH.

Henry VI. had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London (*o*): where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth (*p*). But when, upon the assassination of Villiers duke of Buckingham by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England (*q*). It seems astonishing that this usage, of administering the torture, should be said to arise from the tenderness to the lives of men: and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nations (*r*): viz. because the laws cannot endure that any man should die upon the evidence of a false, or even a single witness; and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardiness of his constitution, and his guilt by the sensibility of his nerves! But there needs only to state accurately (*s*), in order most effectually to expose this inhuman species of mercy, the uncertainty of which, as a test, and criterion of truth, was long ago very elegantly pointed out by Tully; though he lived in a state wherein it was *usual to torture slaves in order to furnish evidence: "*tamen*," says he, "*illa tormenta gubernat dolor, moderatur natura cujusque tum animi tum corporis, regit quæsitior, flectit libido, corrumpit spes, infirmat metus; ut in tot rerum angustiis nihil veritati loci relinquitur* (*t*) (7)."

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(*o*) 3 Inst. 35.

(*p*) Barr. 92, 496.

(*q*) Rushw. Coll. i. 638.

(*r*) Cod. l. 9, t. 41, l. 8, and t. 47, l. 16; Fortesc. de LL. Ang. c. 22.

(*s*) The marquis Beccaria, (ch. 16,) in an exquisite piece of raillery, has proposed this problem, with a gravity

and precision that are truly mathematical: "the force of the muscles and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain necessary to make him confess himself guilty of a given crime."

(*t*) Pro Sulla, 28.

(7) But mental anguish subdues these torments, the constitution of

every man's mind as well as body moderates them, the inquisitor regulates

The English judgment of penance for standing mute (*v*) was as follows : that the prisoner be remanded to the prison from whence he came ; and put into a low dark chamber ; and there be laid on his back, on the bare floor, naked, unless where decency forbids ; that there be placed upon his body as great a weight of iron as he could bear, and more : that he have no sustenance, save only, on the first day, three morsels of the worst bread ; and, on the second day, three draughts of standing water, that should be nearest to the prison door ; and in this situation this should be alternately his daily diet, *till he died*, or (as anciently the judgment ran) *till he answered* (*u*).

It hath been doubted whether this punishment subsisted at the common law (*w*), or was introduced in consequence of the statute Westm. 1, 3 Edw. I. c. 12 (*x*), which seems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any ancient author, case, or record, that hath yet been produced,) previous to the reign of Edward I. : but there are instances on record in the reign of Henry III. (*y*), where persons accused of felony, and standing mute, were tried in a particular manner, by two successive judges, and convicted ; and it is asserted by the judges in 8 Hen. IV. that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony (*z*). This statute of Edward I. directs such persons **as will not put themselves upon inquests of felonies before the judges at the suit of the king, to be put into hard and strong prison (soient mys en la prisone fort et dure) as those which refuse to be at the common law of the land.*" And, immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very strait confinement in prison, with hardly any degree of sustenance : but no weight is directed to be laid upon the body, so as to

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(*v*) 2 Hal. P. C. 319; 2 Hawk. P. C. 329.

(*u*) Britton, c. 4 & 22. Flet. l. 1, c. 34, § 33.

(*w*) 2 Inst. 179. 2 Hal. P. C. 322. 2 Hawk. P. C. 330.

(*x*) Staundf. P. C. 149; Barr. 82.

(*y*) Emelyn on 2 Hal. P. C. 322.

(*z*) *Al common ley, avant le statute de West. 1, c. 12, si ascun, ust estie appeal, et ust estre mute, ill serra convict de felony.* (M. 8 Hen. IV. 2.)

them, passion diverts, hope corrupts, fear debilitates, until, in the perplexi-

ties of so many things, no room is left for truth.

hasten the death of the miserable sufferer: and, indeed, any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the mirror (a) as a species of criminal homicide. It also clearly appears, by a record of 31 Edw. III. (b), that the prisoner might then possibly subsist for forty days under this lingering punishment. I should, therefore, imagine that the practice of loading him with weights, or, as it was usually called, *pressing him to death*, was gradually introduced between 31 Edw. III. and 8 Hen. IV. at which last period it first appears upon our books (c); being intended as a species of mercy to the delinquent, by delivering him the sooner from his torment: and hence I presume it also was, that the duration of the penance was then first (d) altered; and, instead of continuing *till he answered*, it was directed to continue *till he died*, which must very soon happen under an enormous pressure.

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The uncertainty of its original, the doubts that were conceived of its legality, and the repugnance of its theory (for it rarely was carried into practice) to the humanity of the laws of England, all concurred to require a legislative abolition of this cruel process, and a restitution of the ancient common law; whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood and the consequent escheat in felony had been removed, the judgment of *peine forte et dure* might, perhaps, have still innocently remained, *as a monument of the savage rapacity with which the lordly tyrants of feudal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the *lands*, were saved in felony and petit treason; though not the forfeiture of the *goods*; and therefore this lingering punishment was probably introduced, in order to extort a plea; without which it was held that no judgment of death could be given, and so the lord lost his escheat. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same

(a) Ch. 1, § 9.

(b) 6 Rym. 13.

(c) Yearb. 6 Hen. IV. 1.

(d) *Et fuit dit, que le contraire avoit estre fait devant ces heurs.* (Ibid. 2.)

forfeitures always attended it, as in other cases of conviction (*e*). And very lately, to the honour of our laws, it hath been enacted by statute 12 Geo. III. c. 20, that every person who, being arraigned for felony or piracy, shall stand mute or not answer directly to the offence, shall be convicted of the same; and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime (8). And thus much for the demeanor of a prisoner upon his arraignment, by standing mute; which now, in all cases, amounts to a constructive confession (9).

II. The other incident to arraignment exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment (*f*).

II. Confession, which is either simple,

But there is another species of confession, which we read much of in our ancient books, of a far more complicated kind, which is called *approvement*. And that is when a *person, indicted of treason or felony, and arraigned for the same, doth confess the fact before plea pleaded; and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. In this case he is called an *approver* or prover, *probator*, and the party appealed or accused is called the *appellee*. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to

or by approvement,

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(*e*) 2 Hawk. P. C. 331.

(*f*) 2 Hal. P. C. 225.

(8) Two instances have occurred, since the passing of this statute, of persons who refused to plead, and who, in consequence, were condemned and executed. One was at the Old Bailey, for murder, in 1777, the other was for burglary, at the summer assizes at Wells, in 1792. It might perhaps have been a greater improvement of the law, if the prisoner's silence had been considered a plea of not guilty,

rather than a confession. For it would operate more powerfully as an example, and be more satisfactory to the minds of the public, if the prisoner should suffer death after a public manifestation of his guilt by evidence, than that he should be ordered for execution only from the presumption which arises from his obstinate silence.—CH.

(9) Vide *ante*, 324, note (5).

answer it; and if he hath no reasonable and legal exceptions to make to the person of the approver, which indeed are very numerous, he must put himself upon his trial, either by battle, or by the country; and, if vanquished or found guilty, must suffer the judgment of the law, and the approver shall have his pardon *ex debito justitiæ*. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, *viz.* the convicting of some other person, and therefore his conviction remains absolute.

which has been long disused, and fully provided for by modern statutes permitting accomplices to give evidence.

But it is purely in the discretion of the court to permit the approver thus to appeal, or not; and, in fact, this course of admitting approvements hath been long disused: for the truth was, as Sir Matthew Hale observes, that more mischief hath arisen to good men by these kind of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And, therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein (*g*): though, since their discontinuance, the doctrine of approvements is become a matter of more curiosity than use. I shall only observe, that all the good, whatever it be, that can be expected from this method of approvement, is fully provided for in the case of coining, robbery, burglary, housebreaking, horsestealing, and larceny, to the value of five shillings, from shops, warehouses, stables, and coach-houses, by statutes 4 and 5 W. and M. c. 8, *6 and 7 W. III. c. 17, 10 and 11 W. III. c. 23, and 5 Ann. c. 31, which enact, that, if any such offender, being out of prison, shall discover two or more persons, who have committed the like offences, so as they may be convicted thereof; he shall in case of burglary or housebreaking receive a reward of 40*l.*, and, in general, be entitled to a pardon of all capital offences, excepting only murder and treason; and of them also in the case of coining (*h*) (10). And if any such person, having feloniously stolen any lead, iron, or other metals,

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(*g*) 2 Hal. P. C. ch. 29. 2 Hawk. P. C. ch. 24.

(*h*) The pardon, for discovering of-

fences against the Coinage Act of 15 Geo. II. c. 28, extends only to all such offences.

(10) These statutes are all repealed; vide, *ante*, 294-5, in notis.

shall discover and convict two offenders of having illegally bought or received the same, he shall, by virtue of statute 29 Geo. II. c. 30, be pardoned for all such felonies committed before such discovery (11). It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree (i) (12) (13).

(i) *The King v. Rudd*; Mich. 16 Geo. III. on a case reserved from the Old Bailey, Oct. 1775.

(11) This statute is repealed by 7 & 8 Geo. IV. c. 27.

(12) In the case of *Mrs. Rudd*, in which this subject is clearly and ably explained by Lord Mansfield, and again by Mr. J. Aston, in delivering the opinion of all the judges, (Cowp. 331,) it is laid down that no authority is given to a justice of peace to pardon an offender, and to tell him he shall be a witness at all events against others. But where the evidence appears insufficient to convict two or more without the testimony of one of them, the magistrate may encourage a hope that he who will behave fairly and disclose the whole truth, and bring the others to justice, shall himself escape punishment. But this discretionary power exercised by the justices of peace is founded in practice only, and cannot control the authority of the court of gaol delivery, and exempt at all events the accomplice from being prosecuted. A motion is always made to the judge for leave to admit an accomplice to be a witness, and unless he should see some particular reason for a contrary conduct, he will prefer the one to whom

this encouragement has been given by the justice of the peace. This admission to be a witness amounts to a promise of a recommendation to mercy, upon condition that the accomplice makes a full and fair disclosure of all the circumstances of the crime for which the other prisoners are tried, and in which he has been concerned in concert with them. Upon failure on his part with this condition, he forfeits all claim to protection. And upon a trial some years ago at York, before Mr. J. Buller, the accomplice, who was admitted a witness, denied in his evidence all that he had before confessed, upon which the prisoner was acquitted; but the judge ordered an indictment to be preferred against this accomplice for the same crime; and upon his previous confession, and other circumstances, he was convicted and executed. And, if the jury were satisfied with his guilt, there can be no question with regard both to the law and justice of the case.

The learned commentator says, that the accomplice thus admitted a witness, shall not afterwards be prosecuted for that or any other previous offence of the

same degree. Mrs. Rudd's case does not warrant the extent of that position, for the decision of that case, and what is advanced by Mr. J. Aston, (Cowp. 341,) and as the editor conceives the reason and principles of this doctrine, will not extend the claim of the witness to mercy beyond those offences in which he has been connected with the prisoners, and concerning which he has previously undergone an examination. And with regard to these crimes he may be cross-examined by the counsel for the prisoner, but of course he may refuse to criminate himself of other charges, against which that prosecution affords him no protection.—CH.

(13) It has now been solemnly decided that an accomplice admitted as king's evidence, and performing the condition on which he is admitted as a witness, is *not entitled*, as matter of right, to be exempt from prosecution for other offences with which he is charged, but that it will be matter in the discretion of the judge whether he will recommend him for a pardon or not; *Rex v. Lee*, R. & R. C. C. 361; *Rex v. Brunton*, id. 454. Even the *equitable claim* of an accomplice to a pardon, on condition of his making a full and fair confession, does not extend to prosecutions for other offences in which he was not concerned with the prisoner: with respect to such offences, therefore, he is not bound to answer on cross-examination; *Lee's, Duce's, & West's cases*, 1 Phil. Ev. 37. But the judges will not, in general, admit an accomplice as king's evidence, although applied to for that purpose by the counsel for the prosecution, if it appear that he is charged with any other felony than that on the trial of which he is to be a witness; 2 C. & P. 411; Car. Cr. L. 62. Where an accomplice is confirmed in his evidence against one prisoner, but not with respect to another, *both* may be convicted, if the jury think the accomplice deserving of credit; *Rex v. Dawber and others*, 2 Stark,

N.P.C. 34; Car. Cr. L. 67, 2d ed. And see *Rex v. Dawber*, 3 Stark. 34-5, n., where it is said, that if the testimony of an accomplice be confirmed so far as it relates to one prisoner, but not as to another, the *one* may be convicted on the testimony of the accomplice, if the jury deem him worthy of credit. An accomplice does not require confirmation as to the person charged, provided he is confirmed in the particulars of his story; *Rex v. Birkett and Brady*, R. & R. C. C. 251. And the corroboration of his evidence need not be on every material point, but he must be so confirmed as to convince the jury that his statement is correct and true; *Rex v. Barnard*, 1 C. & P. 88. If an accomplice is confirmed only as to collateral facts, which do not connect either the accused with the offence, or the accused and the accomplice together, it is not sufficient; *Rex v. Addis*, 6 C. & P. 383. Proving by other witnesses that a robbery was in fact committed, in the mode in which an accomplice states it to have been committed, is not such a confirmation of the accomplice as is required to warrant a conviction on his evidence; *Rex v. Webb*, 6 C. & P. 595. A person indicted for a misdemeanor *may* be legally convicted upon the uncorroborated evidence of an accomplice; *Rex v. Jones*, 2 Camp. 132. So *may* a person indicted for a capital offence; *Jordaine v. Lashbrook*, 7 T. R. 609. But the testimony of accomplices alone is seldom of sufficient weight with a jury to convict the offenders; the temptation to commit perjury being so great, where the witness by accusing another may escape himself. The practice, therefore, is to advise the jury to regard the evidence of an accomplice, only in cases where he is confirmed, in some part of his testimony, by unimpeachable testimony; Phil. Ev. 34, 3d ed. And see id. c. 4, § 2, and the several authorities there cited and considered. See also 2 Stark. Ev. 11, *et seq.*

CHAPTER XXVI.

OF PLEA AND ISSUE.

WE are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess, or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

The, prisoner's
pleas are,

Formerly, there was another plea, now abrogated, that of *sanctuary*; which is, however, necessary to be lightly touched upon, as it may give some light to many parts of our ancient law: it being introduced and continued during the superstitious veneration that was paid to consecrated ground in the times of popery. First, then, it is to be observed, that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or churchyard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and took the oath in that case provided, *viz.* that he abjured the realm, and would depart from thence forthwith at the port that should be assigned him, and would never return without leave from the king; he by this means saved his life, if he observed the conditions of the oath, by going with a cross in *his hand, and with all convenient speed, to the port assigned, and embarking. For if, during this forty days' privilege of sanctuary, or in his road to the sea-side, he was apprehended and arraigned in any court, for this felony, he might plead the privilege of sanctuary, and had a right to be remanded, if taken out against his will (*a*). But by this abjuration his blood was attainted, and he forfeited all his goods and chattels (*b*). The immunity of these privileged places was very much abridged by the statutes 27 Hen. VIII. c. 19, and 32 Hen. VIII. c. 12. And now, by the statute 21 Jac. I. c. 28, all privilege of sanctuary,

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(*a*) Mirr. c. 1, § 13; 2 Hawk. P. C. 335. (*b*) 2 Hawk. P. C. 52.

and abjuration consequent thereupon, is utterly taken away and abolished.

Formerly also the benefit of clergy used to be pleaded before trial or conviction, and was called a *declinatory* plea; which was the name also given to that of sanctuary (c). But, as the prisoner upon a trial has a chance to be acquitted, and totally discharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after as before conviction; this course is extremely disadvantageous; and therefore the benefit of clergy is now very rarely pleaded; but, if found requisite, is prayed by the convict before judgment is passed upon him (1).

I proceed, therefore, to the five species of pleas before mentioned.

I. A plea to the jurisdiction of the court, which makes all answer to the charge unnecessary.

I. A plea to the *jurisdiction*, is where an indictment is taken before a court, that hath no cognizance of the offence; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions: in these, or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged (d) (2).

II. A demurrer to the indictment which is seldom resorted to, because the same advantages may be had on a plea of not guilty, or in arrest of judgment.

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II. A demurrer to the indictment (3). This is incident to criminal cases, as well as civil, when the fact as alleged is *allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held (e), that if, on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgment and ex-

(c) 2 Hal. P. C. 236.

(d) Ibid. 256.

(e) 2 Hal. P. C. 257.

(1) Benefit of clergy is abolished in all cases of felony by 7 & 8 Geo. IV. c. 28, § 6.

(2) Pleas to the jurisdiction must be pleaded before the general issue, and must, it seems, in general, be supported

by affidavit; 1 Chit. Cr. L. 438-9.

(3) On a demurrer to an indictment, the superior court will look into the whole record; *Rex v. Fearnley*, 1 Leach, C. C. 425.

ecution, as if convicted by verdict. But this is denied by others (*f*), who hold, that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shewn it appears to be felony; the court will not record the confession, but admit him afterwards to plead not guilty (*g*). And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may, in some cases, lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty; or afterwards in arrest of judgment, when the verdict has established the fact.

III. A plea in *abatement* is principally for a *misnomer*, a wrong name, or a false addition to the prisoner. As, if *James Allen, gentleman*, is indicted by the name of *John Allen, esquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And, if either fact is found by a jury, then the *indictment shall be abated, as writs or declarations may be in civil actions; of which we spoke at large in the preceding volume (*h*) (4). But, in the end, there is little advantage accruing to the prisoner by means of these dilatory pleas: because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended. Let us therefore next consider a more substantial kind of plea, *viz.*

III. A plea in abatement, as of misnomer; these are merely dilatory pleas, and attended with little advantage.

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IV. Special pleas in *bar*; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime

IV. Special pleas in bar, which are

(*f*) 2 Hawk. P. C. 334. (*g*) 2 Hal. P. C. 225. (*h*) See vol. III. p. 302.

(4) But, now, such pleas are wholly useless; vide 7 Geo. IV. c. 64, § 19; set out, *ante*, 306, note (6).

alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal (i): but these are applicable to both appeals and indictments.

1, Autrefois acquit,

1. First, the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction of the offence (j), he may plead such acquittal in bar of any subsequent accusation for the same crime (5). Therefore an acquittal on an appeal is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law (k): and, therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past: by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience, the statute 3 Hen. VII. c. 1, enacts, that *indictments shall be proceeded on, immediately at the king's suit,

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(i) 2 Hawk. P. C. ch. 23.

(k) 2 Hawk. P. C. 373.

(j) 3 Mod. 194.

(5) But such a plea must be strictly regular both in form and substance; for, in cases of misdemeanor, if it is held bad on demurrer, final judgment may be entered up against the defendant; *Rex v. Taylor*, 5 D. & R. 422; 3 B. & C. 502; *post* 338, note (9). And if it is irregularly pleaded, and the acquittal which it sets forth appears to have been obtained by collusion, the court will strike the plea off the file; *Rex v. Taylor*, 5 D. & R. 521; 3 B. & C. 612. A plea of *autrefois acquit* cannot be pleaded unless the facts charged in the second indictment, would, if true, have sustained the first; *Rex v. Vandercomb*, 2 East, P. C. 519. If, in a plea of *autrefois acquit*, the prisoner were to insist on two distinct re-

cords of acquittal, his plea would be bad for duplicity. But semble, that if he insisted upon the wrong, the court would, in a capital case, take care that he did not suffer by it; *Rex v. Sheen*, 2 C. & P. 635. And if the prisoner could have been legally convicted on the first indictment upon any evidence that might have been adduced, his acquittal on that indictment may be successfully pleaded to a second indictment; and it is immaterial whether the proper evidence was adduced at the trial of the first indictment or not; *Id. ibid.* A prisoner indicted for felony may plead not guilty after his special plea of *autrefois acquit* has been found against him; *Rex v. Welch*, Car. Cr. L. 56.

for the death of a man, without waiting for bringing an appeal; and the plea, of *autrefois acquit* on an indictment, shall be no bar to the prosecuting of any appeal.

2. Secondly, the plea, of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, being suspended by the benefit of clergy or other causes, is a good plea in bar to an indictment (6). And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime (1). Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of *autrefois acquit* and *autrefois convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime. But the case is otherwise, in

and 2, *Autrefois convict*, both which must be on a prosecution for the same identical act;

(1) 2 Hawk. P. C. 377.

(6) Where a party has been tried at a court of quarter sessions, which has previously lapsed for want of due adjournment, he has a right to have a record of the proceedings made up by the clerk of the peace, although the object of the application is to enable him to support a plea of *autrefois convict*; *Rex v. Justices of Middlesex*, 3 Nev. & Man. 110.

The court will not reject a plea of *autrefois convict*, on account of the informal manner in which it is handed in by the prisoner; but will assign him counsel to put it into a formal shape, and postpone the trial, to give time for its preparation; *Rex v. Chamberlain*, 6 C. & P. 93.

A plea of *autrefois convict* can only be proved by the record; and the indictment, with the finding of the jury, &c., indorsed by the proper officer, is not sufficient, although it appears that no record has been made up. But the court, before whom the prisoner is brought to be tried the second time, will postpone the trial at the request of

the prisoner, on affidavit of the fact, to give time for an application for a mandamus to compel the making up of the record; *Rex v. Bowman*, 6 C. & P. 101.

A plea of *autrefois convict* stated that the prisoner was indicted, convicted, and sentenced at a session of the peace duly holden by adjournment on Friday the 5th of July. The record produced in support of the plea stated that the indictment was found at a session commenced and holden on Monday the 1st of July, and that the court was adjourned till Tuesday the 2nd; and that the court, having re-assembled on Thursday the 4th, was adjourned to Friday the 5th, when the prisoner was tried and convicted: It was held that the plea was not proved by the record, because, for the want of an adjournment from the Tuesday to the Thursday, the proceedings on the Friday were *coram non judice* and a nullity; *Rex v. Bowman*, 6 C. & P. 337.

3. Autrefois attaint, which may be pleaded to any charge of felony, with some exceptions;

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3. Thirdly, the plea of *autrefois attaint*, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or heretofore by abjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony (*m*). And this because, generally, such proceeding on a second prosecution cannot be to any purpose; for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavour to attaint him a second time. But to this general rule, however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex*. As, 1. Where the former attainder is reversed for error, for then it *is the same as if it had never been. And the same reason holds, where the attainder is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, such attainder is no bar to an appeal: for the prior sentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the suit of the subject, by suffering the prior sentence to stop the prosecution of a second, and then, when the time of appealing is elapsed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treason: because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons. 4. Where a person attainted of one felony, is afterwards indicted as principal in another, to which there are also accessaries, prosecuted at the same time; in this case it is held, that the plea of *autrefois attaint* is no bar, but he shall be compelled to take his trial, for the sake of public justice: because the accessaries to such second felony cannot be convicted till after the conviction of the principal (*n*). And from these instances we may collect that the plea of *autrefois attaint* is never good, but when a second trial would be quite superfluous (*o*) (7).

(*m*) 2 Hawk. P. C. 375. (*n*) Poph. 107. (*o*) Staund. P. C. 107.

(7) By the 7 & 8 G. IV. c. 28, § 4, it is enacted that no plea setting forth

4. Lastly, a *pardon* may be pleaded in bar; as at once destroying the end and purpose of the indictment, by re-mitting that punishment, which the prosecution is calculated to inflict (8). There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, *before* sentence is past; which gives it by much the preference to pleading it *after* sentence or attainder. This is, that by stopping the judgment it stops the attainder, and prevents the corruption of the blood: which, when once corrupted by attainder, cannot afterwards be restored, otherwise than by Act of Parliament. But, as the title of pardons is applicable to other stages of prosecution; and they have their respective force and efficacy, as well after as before conviction, outlawry, or *attainder; I shall therefore reserve the more minute consideration of them, till I have gone through every other title except only that of execution.

4, Pardon, which should be pleaded before sentence past.

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Before I conclude this head of special pleas in bar, it will be necessary once more to observe, that, though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; as if, on an action of debt the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first: for he has made his election what plea to abide by, and it was his own folly to choose a rotten defence; though, I say, this strictness is observed in civil actions, *quia interest reipublicæ ut sit finis litium*: yet in criminal prosecutions *in favorem vitæ*, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or

The prisoner is not concluded by any of these pleas.

any attainder, shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment: by which enactment the plea of *autrefois attaint* seems to be at an end.

(8) But a proclamation *promising* a pardon cannot be pleaded as a pardon; *Rex v. Garside*, 4 Nev. & Man. 33.

But where such a proclamation had been made, the Court of King's Bench, in their discretion, deferred awarding

execution upon a sentence of death, until the prisoner should have had time to apply to the Secretary of State for a pardon, according to the terms of the proclamation; *id*, *ibid*.

Semble, that a pardon after judgment may be pleaded *ore tenus*, and in bar of execution, and that there may be a demurrer to such a plea *ore tenus*; *id*. *ibid*.

See further upon the subject of pardon, *post*, 398.

convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty (*p*). For the law allows many pleas, by which a prisoner may escape death; but only one plea, in consequence whereof it can be inflicted; *viz.*, on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury (9). It remains therefore that I consider,—

V. The general issue, not guilty.

V. The general issue, or plea of *not guilty* (*q*), upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For, besides that these pleas do in effect amount to the general issue; since, if true, the prisoner is most clearly not guilty, as the facts in treason are *laid to be done *proditorie et contra ligeantiæ suæ debitum*, and, in felony, that the killing was done *felonice*; these charges, of a traitorous or felonious intent, are the points and very *gist* of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give

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(*p*) 2 Hal. P. C. 239.

(*q*) See Append. § 1.

(9) This rule does not extend to cases of misdemeanor; *vide ante*, 335, note (5). In *Rex v. Taylor*, 5 D. & R. 422; 3 B. & C. 502, the indictment alleged that defendant, in the reign of the *present* king, kept a common gaming-house. The plea stated that defendant, in the reign of the *present* king, was acquitted upon an indictment for keeping a common gaming-house in the reign of the *late* king, against the peace of our *said* lord the king; and averred the identity of the offences. To this there was a demurrer, concluding with a prayer of judgment of *respondeat ouster*. It was held by the Court of King's Bench, first, that the plea was bad, because the indictment upon which

the acquittal was founded, charged an offence committed in the reign of the *late* king, and defendant could not by averment shew that the offence charged in both indictments was the same; and, second, that the judgment on demurrer was final, although the demurrer concluded with a prayer of judgment of *respondeat ouster*. The principle upon which that decision proceeded seems to have been, that the phrase, *in favorem vitæ*, must be construed strictly, and as applicable to those cases only where the life of the party is actually in jeopardy. For the arguments and authorities upon this important point see that case; and see 8 East, 107.

their verdict accordingly as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner (r) (10).

When the prisoner hath thus pleaded not guilty, *non culpabilis*, or *nient culpable*; which was formerly used to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*," the clerk of the assize, or clerk of the arraigns, on behalf of the crown, replies, that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables in the same spirit of abbreviation, "*cul. prit.*" which signifies first that the prisoner is guilty, (*cul. culpable*, or *culpabilis*;) and then that the king is ready to prove him so; *prît præsto sum*, or *paratus verificare*. This is, therefore, a replication on behalf of the king *vivâ voce* at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner: for when the pleader intended to demur, he expressed his demurrer in a single word, "*judgment*;" signifying that he demanded judgment whether the writ, declaration, plea, &c. either in form or matter, were sufficiently good in law: and if he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, "*prît*;" signifying that he was ready to prove his assertions: as may be observed from the year-books and other ancient repositories of law (s). By this replication the king and the prisoner are therefore at issue: for we may remember, in our strictures upon pleadings in the preceding book (t), it was observed, that when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of *fact: which is evidently the case here in the plea of *non cul.* by the prisoner; and the replication of *cul.* by the clerk. And we may also remember, that the usual conclusion of all affirmative pleadings, as this of *cul.* or *guilty* is, was by an averment in these words, "and this he is *ready* to verify; *et hoc paratus est verificare*:" which same thing is here expressed by the single word "*prît*."

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(r) 2 Hal. P. C. 258.

(t) See vol. III. p. 312.

(s) North's Life of Ld. Guildford, 98.

(10) On pleading this plea, the prisoner, if in irons, is entitled to have them removed, in order that he may suffer no unnecessary pain or restraint on his trial; 1 Chit. Cr. L. 471.

How our courts came to express a matter of this importance in so odd and obscure a manner, "*rem tantam tam negligenter*," can hardly be pronounced with certainty. It may, perhaps, however, be accounted for by supposing, that these were at first short notes, to help the memory of the clerk, and remind him what he was to reply; or else it was the short method of taking down in court, upon the minutes, the replication and averment; "*cul. prît*:" which afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken (*u*).

But, however it may have arisen, the joining of issue, which, though now usually entered on the record (*w*), is no otherwise joined (*x*) in any part of the proceedings, seems to be clearly the meaning of this obscure expression (*y*); which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, "*culprit*, how wilt thou be tried?" for immediately upon issue joined it is inquired of the prisoner, by what trial he will make his innocence appear (11). This

(*u*) Of this ignorance we may see daily instances, in the abuse of two legal terms of ancient French, one the prologue to all proclamations, "*oyez*," or hear ye, which is generally pronounced most unmeaningly "O yes:" the other, a more pardonable mistake, *viz.* when a jury are all sworn, the offi-

cer bids the crier number them, for which the word in law French is, "*countez*;" but we now hear it pronounced in very good English, "count these."

(*w*) See Appendix, § 1.

(*x*) 2 Hawk. P. C. 399.

(*y*) 2 Hal. P. C. 258.

(11) The learned judge's explanation of *prît* from *præsto sum*, or *paratus verificare*, however ingenious, is certainly inconsistent both with the principles and practice of special pleading. After the general issue, or the plea of not guilty, there could be no replication; or the words *paratus verificare* could not possibly have been used. This plea in Latin was entered thus upon the record: *Non inde est culpabilis, et pro bono et malo ponit se super patriam*; after this the attorney general, the king's coroner, or clerk of assize, could only join issue by *facit similiter*, or *he doth the like*. (See App. p. 3,

at the end of this book.) If then I might be allowed to indulge a conjecture of my own, I should think that *prît* was an easy corruption of *pñt*. written for *ponit*, by the clerk, as a minute that issue was joined, or *ponit se super patriam*; or *pñt se* might be converted into *prist* or *prest*, as it is sometimes written. *Cul* was probably intended to denote the plea, and *prît* the issue; and these syllables being pronounced aloud by the clerk to give the court and prisoner an opportunity of hearing the accuracy of the minute, and being immediately followed by the question, How wilt thou be tried? naturally induced

form has at present reference to appeals and approvements only wherein the appellee has his choice, either to try the *accusation by battle or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but by jury, *per pais*, or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the country (z), if a commoner; and, if a peer, by God and his peers (a), the indictment, if in treason, is taken *pro confesso*: and the prisoner, in cases of felony, is adjudged to stand mute, and, if he perseveres in his obstinacy, shall now (b) be convicted of the felony (12).

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When the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt

(z) A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is, "*by God or the country*," that is, either by ordeal or by jury; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by ordeal used formerly to be called

judicium Dei. But it should seem, that when the question gives the prisoner an option, his answer must be positive; and not in the disjunctive, which returns the option back to the prosecutor.

(a) Keylinge, 57; State Trials, *passim*.

(b) Stat. 12 Geo. III. c. 20.

the ignorant part of the audience to suppose that *cul. prit.* was an appellation given to the prisoner. As a confirmation of the conjecture that *prit* is a corruption of *putt.*, the clerk of arraigns at this day, immediately after the arraignment, writes upon the indictment over the name of the prisoner, *puts*. And Roger North informs us, that in ancient times, when pleadings in the courts were *ore tenus*, "if a serjeant in the common pleas said *judgment*, that was a demurrer; if *prist*, that was an issue to the country." *Life of Lord Keeper North*, 98.—CH.

(12) By 7 & 8 Geo. IV. c. 28, § 1, it is enacted, that if any person, not having privilege of peerage, being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of "not guilty," he shall, by such plea, without any further form,

be deemed to have put himself upon the country for trial, and the court shall, in the usual manner, order a jury for the trial of such person accordingly. In consequence of this wise enactment, the absurd ceremony of asking a prisoner how he will be tried, has been wholly discontinued. By sect. 2 of the same statute it is enacted, that if any person being arraigned upon, or charged with any indictment for treason, felony, piracy, or misdemeanor, *shall stand mute, or will not answer directly*, to the indictment or information, in every such case it shall be lawful for the court, *if it shall so think fit*, to order the proper officer to enter a plea of "not guilty" on behalf of such person; and the plea so entered shall have the same force and effect, as if such person had actually pleaded the same; *vide ante* 324, note (5).

may appear, "God send thee a good deliverance" (13). And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

(13) This is now omitted in practice, as is also the form of asking the

prisoner how he will be tried. See the last note.

CHAPTER XXVII.

OF TRIAL AND CONVICTION.

THE several methods of trial and conviction of offenders established by the laws of England, were formerly more numerous than at present, through the superstition of our Saxon ancestors; who, like other northern nations, were extremely addicted to divination; a character which Tacitus observes of the ancient Germans (*a*). They therefore invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously, to vindicate the guiltless.

The various methods of trial and conviction are,

I. The most ancient (*b*) species of trial was that by *ordeal*; which was peculiarly distinguished by the appellation of *judicium Dei*; and sometimes *vulgaris purgatio*, to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts (*c*), either *fire-ordeal* or *water-ordeal*; the former being confined to persons of higher rank, the latter to the common people (*d*). Both these might be *performed by deputy: but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain, for hire, or perhaps for friendship (*e*). Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of redhot iron, of one, two, or three pounds weight; or else by walking, barefoot and blindfold, over nine redhot ploughshares, laid lengthwise at unequal distances: and if the party escaped being hurt, he

I. Ordeal, the most ancient species of all, being of two kinds,

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fire-ordeal, and

(*a*) De mor Germ. 10.

(*b*) LL. Inæ, c. 77.

(*c*) Mirr. c. 3, § 23.

(*d*) *Teneteur se purgare is qui accusatur, per Dei judicium; scilicet per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum si fuerit homo liber; per aquam, si fuerit rusticus; (Glanv. l. 14, c. 1.)*—"The accused is bound to purge

himself by the judgment of God, viz. by hot iron, or by water, according to the rank of the party; by hot iron if he be a freeman, by water if he be a vassal."

(*e*) This is still expressed in that common form of speech, "of going through fire and water to serve another."

was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the Confessor, is mentioned to have cleared her character, when suspected of familiarity with Alwyn bishop of Winchester (*f*).

water-ordeal :

Water-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby; or by casting the person suspected into a river or pond of cold water; and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity still practised in many countries to discover witches, by casting them into a pool of water, and drowning them to prove their innocence. And in the eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those whom he suspected to handle the hot iron: thus joining, as had been well remarked (*g*) to the most dubious crime in the world, the most dubious proof of innocence.

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And indeed this purgation by ordeal seems to have been very ancient, and very universal, in the times of superstitious barbarity. It was known to the ancient Greeks: for in the *Antigone of Sophocles (*h*), a person, suspected by Creon of a misdemeanour, declares himself ready "to handle hot iron, and to walk over fire," in order to manifest his innocence; which the scholiast tells us, was a very usual purgation. And Grotius (*i*) gives us many instances of water-ordeal in Bithynia, Sardinia, and other places. There is also a very peculiar species of water-ordeal, said to prevail among the Indians on the coast of Malabar; where a person accused of any enormous crime is obliged to swim over a large river abounding with crocodiles, and, if he escapes unhurt, he is reputed innocent. As, in Siam, besides the usual methods of fire and water ordeal, both parties are sometimes exposed to the fury of a tiger let loose for that purpose: and, if the beast spares either, that person is accounted innocent; if neither, both are held to

(*f*) Tho. Rudborne Hist. Maj. Winton, l. 4, c. 1.

(*g*) Sp. L. b. 12, c. 5.

(*h*) V. 270.

(*i*) On Numb. v. 17.

be guilty; but if he spares both, the trial is incomplete, and they proceed to a more certain criterion (*k*).

One cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate interposition of Providence to save the innocent, whenever it was presumptuously required. And yet in England, so late as king John's time, we find grants to the bishops and clergy to use the *judicium ferri, aquæ, et ignis* (*l*). And, both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground; for which Stiernhook (*m*) gives the reason; "*non defuit illis operæ et laboris pretium; semper enim ab ejusmodi judicio aliquid lucri sacerdotibus obveniebat* (1)." But, to give it its due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum sit contra præceptum Domini, non tentabis Dominum Deum tuum* (*n*) (2)." Upon this authority, though the canons *themselves were of no validity in England, it was thought proper, as had been done in Denmark above a century before (*o*), to disuse and abolish this trial entirely in our courts of justice, by an Act of Parliament in 3 Hen. III. according to Sir Edward Coke (*p*), or rather by an order of the king in council (*q*).

and which was abolished in the reign of H. III.

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II. Another species of purgation, somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the *corsned* or morsel of execration: being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism; desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment,

II. The corsned, which has also been long abolished.

(*k*) Mod. Univ. Hist. vii. 266.

(*o*) Mod. Un. Hist. xxxii. 105.

(*l*) Spelm. Gloss. 435.

(*p*) 9 Rep. 32.

(*m*) De jure Sueonum, l. 1, c. 8.

(*q*) 1 Rym. Foed. 228; Spelm.

(*n*) Decret. part. 2, caus. 2, qu. 5, dist. 7. Decretal. tib. 3, tit. 50, c. 9, and Gloss. *ibid*.

Gloss. 326; 2 Pryn. Rec. Append. 20; Seld. Eadm. fol. 48.

(1) They did not lose the reward of their care and labour, for in every ordeal of this kind, some profit accrued to the priest.

(2) Inasmuch as it is contrary to the commandment of the Lord, Thou shalt not tempt the Lord thy God.

if he was innocent (*r*): as the water of jealousy among the Jews (*s*) was, by God's special appointment, to cause the belly to swell, and the thigh to rot, if the woman was guilty of adultery. This corsned was then given to the suspected person, who at the same time also received the holy sacrament: if indeed the corsned was not, as some have suspected, the sacramental bread itself; till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwin, Earl of Kent, in the reign of king Edward the Confessor, abjuring the death of the king's brother, at last appealed to his corsned, "*per bucellam deglutiendam abjuravit* (*u*)," which stuck in his throat and killed him. This custom has been long since gradually abolished, though the remembrance of it still subsists in certain phrases of abjuration retained among the common people (*w*).

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* However, we cannot but remark, that though in European countries this custom most probably arose from an abuse of revealed religion, yet credulity and superstition will, in all ages and in all climates, produce the same or similar effects. And therefore we shall not be surprised to find, that in the kingdom of Pegu there still subsists a trial by the corsned, very similar to that of our ancestors, only substituting raw rice instead of bread (*x*). And, in the kingdom of Monomotapa, they have a method of deciding lawsuits equally whimsical and uncertain. The witness for the plaintiff chews the bark of a tree, endued with an emetic quality; which, being sufficiently masticated, is then infused in water, which is given the defendant to drink. If his stomach rejects it, he is condemned; if it stays with him, he is absolved, unless the plaintiff will drink some of the same water; and, if it stays with him also, the suit is left undetermined (*y*).

These two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, owes its introduction among us to the princes of the Norman line. And that is

III. The trial by *battle*, duel, or single combat; which

(*r*) Spelm. Gl. 439.

(*s*) Numb. ch. 5.

(*t*) LL. Canut. c. 6.

(*u*) Ingulph.

(*w*) As, "I will take the sacrament

upon it; may this morsel be my last;" and the like.

(*x*) Mod. Univ. Hist. vii. 129.

(*y*) Ibid. xv. 464.

was another species of presumptuous appeals to Providence, ^{III. Trial by battle.} under an expectation that Heaven would unquestionably give the victory to the innocent or injured party. The nature of this trial in cases of civil injury, upon issue joined in a writ of right, was fully discussed in the preceding book (z): to which I have only to add, that the trial by battle may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal solemnity as that on a writ of right; but with this difference, that there each party might hire a champion, but here they must fight in their proper persons. And therefore if the *appellant or approver be a woman, a priest, an infant, or of the age of sixty, or lame, or blind, he or she may counterplead and refuse the wager of battle; and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage battle, on account of the dignity of their persons; nor the citizens of London, by special charter, because fighting seems foreign to their education and employment. So likewise if the crime be notorious; as if the thief be taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battle from the appellee (a); for it is unreasonable that an innocent man should stake his life against one who is already half-convicted.

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The form and manner of waging battle upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemn (b). The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the same by his body; the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, swears to this effect; "*Hoc audi, homo, quem per manum teneo, &c.* Hear this, O man, whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am anywise guilty of the said felony. So help me God, and the saints; and this I will defend against thee by my body, as this court shall

(z) See vol. III. page 337.

(b) Flet. l. 1, c. 34; 2. Hawk. P. C.

(a) 2 Hawk. P. C. 427.

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award." To which the appellant replies, holding the bible and his antagonist's hand in the same manner as the other: "Hear this, O man, whom I hold by the hand, who callest thyself Thomas by the name of baptism, that thou art perjured; and therefore perjured, because that thou feloniously didst murder my *father, William by name. So help me God and the saints; and this I will prove against thee by my body, as this court shall award (c)." The battle is then to be fought with the same weapons, *viz.* batons, the same solemnity, and the same oath against amulets and sorcery, that are used in the civil combat: and if the appellee be so far vanquished, that he cannot or will not fight any longer, he shall be adjudged to be hanged immediately; and then, as well as if he be killed in battle, Providence is deemed to have determined in favour of the truth, and his blood shall be attainted. But if he kills the appellant, or can maintain the fight from sunrising till the stars appear in the evening, he shall be acquitted. So also if the appellant becomes recreant, and pronounces the horrible word of *craven*, he shall lose his *liberam legem*, and become infamous; and the appellee shall recover his damages, and also be for ever quit, not only of the appeal, but of all indictments likewise for the same offence (3) (4).

IV. Trial by peers, which is very similar to trial by jury.

IV. The fourth method of trial used in criminal cases is that by the peers of Great Britain, in the court of parliament, or the court of the lord high steward, when a peer is capitally

(c) There is a striking resemblance between this process and that of the court of *Areopagus* at Athens for murder; wherein the prosecutor and prisoner were both sworn in the most solemn manner: the prosecutor, that he was related to the deceased, (for none

but near relations were permitted to prosecute in that court,) and that the prisoner was the cause of his death; the prisoner, that he was innocent of the charge against him. (Pott. Antiq. b. 1, c. 19.)

(3) The last time that the trial by battle was awarded in this country, was in the case of Lord Rea and Mr. Ramsey, in the 7 Ch. I. The king by his commission appointed a constable of England to preside at the trial, who appointed a day for the duel, on which the combatants were to appear with a spear, a long sword, a

short sword, and a dagger; but the combat was prorogued to a further day, before which the king revoked the commission. See an account of the proceedings, 11 Harg. St. Tr. 124.—CH.

(4) The trial by battle is now utterly abolished by the statute 59 Geo. III. c. 46. Vide *ante* 317, note (21).

indicted; for in case of an *appeal*, a peer shall be tried by jury (*d*) (5). Of this enough has been said in a former chapter (*e*); to which I shall only now add, that, in the method and regulations of its proceedings, it differs little from the trial *per patriam*, or by jury: except that no special verdict can be given in the trial of a peer (*f*); because the lords of parliament, or the lord high steward, if the trial be *had in his court, are judges sufficiently competent of the law that may arise from the fact: and except also that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority (*g*).

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V. The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter (*h*): “*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale iudicium parium suorum, vel per legem terræ* (6).”

V. Trial by jury, which is secured by magna charta,

The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large (*i*). And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and

and is the palladium of English liberty.

(*d*) 9 Rep. 30; 2 Inst. 49.

c. 3, § 11; Foster, 247.

(*e*) See page 259.

(*h*) 9 Hen. III. c. 29.

(*f*) Hatt. 116.

(*i*) See vol. III. page 379.

(*g*) Kelynge, 56; stat. 7 W. III.

(5) See 3 Inst. 30, *ante* 259, note (1).

(6) No freemen shall be apprehended, or imprisoned, or banished, or

in any other manner disparaged, except by the legal judgment of his peers, or by the law of the land.

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terminer occasionally named by the crown ; who might then, as in France or Turkey, imprison, despatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English law have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime unless upon the preparatory accusation of twelve or more of his fellow-subjects, the grand jury : and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, *should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this *palladium* remains sacred and inviolate ; not only from all open attacks, which none will be so hardy as to make, but also from all secret machinations, which may sap and undermine it ; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however *convenient* these may appear at first, as doubtless all arbitrary powers, well executed, are the most *convenient*, yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters ; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution ; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

What was said of juries in general, and the trial thereby, in *civil* cases, will greatly shorten our present remarks, with regard to the trial of *criminal* suits ; indictments, informations, and appeals ; which trial I shall consider in the same method that I did the former ; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

When, therefore, a prisoner on his arraignment has pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto* ; that is freeholders, without just exception, and of the *visne* or neighbourhood : which is interpreted to be of the

The jurors are
empannelled by
the sheriff,

county where the fact is committed (*j*) (7). If the proceedings are before the court of King's Bench, there is time allowed, between the arraignment and the trial, for a jury to be *empanelled by writ of *venire facias* to the sheriff, as in civil causes: and the trial in case of a misdemeanour is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offence. But, before commissioners of *oyer and terminer* and gaol delivery, the sheriff, by virtue of

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(*j*) 2 Hal. P. C. 264; 2 Hawk. P. C. 403.

(7) By the 6 Geo. IV. c. 50, § 1, every man, between the age of twenty-one and sixty, residing in any county in England, who shall have in his own name or in trust for him, within the same county, 10*l.* by the year above reprises in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or in rents issuing out of such lands, &c., or in such lands, &c., and rents taken together, in fee simple, fee tail, or for the life of himself or another, or who shall have 20*l.* by the year above reprises, in lands, &c., held by lease for twenty-one years or longer, or for any term of years determinable on any life or lives, or who, being a householder, shall be rated to the poor rate, or to the inhabited house duty in the county of Middlesex, on a value of 30*l.*, or in any other county 20*l.*, or who shall occupy a house containing fifteen windows, shall be qualified and liable to serve on juries for the trial of all issues joined in any of the king's courts of record, at Westminster, and in the superior courts, both civil and criminal, of the counties palatine, and in all courts of assize, *nisi prius*, *oyer and terminer*, and gaol delivery, such issues being respectively triable in the county, &c. in which every man so qualified respectively shall reside, and on grand juries in courts of sessions of the peace, and on petty juries for the trial of all issues joined therein, and triable in the

county, &c., in which every man so qualified respectively shall reside; and the regulation with respect to Wales is the same, only limiting the qualifications to three fifths of the foregoing.

By § 2, peers; judges of the king's courts of record at Westminster, and of the courts of great sessions in Wales; clergymen in holy orders; priests of the Roman Catholic faith; persons teaching or preaching in congregations of protestant dissenters; serjeants and barristers at law actually practising; members of the society of doctors of law, and advocates of the civil law actually practising; attornies, solicitors, and proctors, duly admitted, actually practising, and having duly taken out their certificates; officers of courts actually exercising their offices; coroners, gaolers, and keepers of houses of correction; physicians, surgeons, and apothecaries, actually practising; officers in the navy or army on full pay; pilots; household servants of the king; officers of customs and excise; sheriff's officers, high constables, and parish-clerks; are *exempt*.

And by § 3, no man not being a natural born subject of the king, except, (§ 47,) on trials of aliens, where a jury *de medietate* is demanded; and no man attainted of treason or felony, or convicted of any infamous crime, unless he has obtained a free pardon; nor any man under outlawry or excommunication; shall be *qualified*.

a general precept directed to him beforehand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that session: and therefore it is there usual to try all felons immediately, or soon after their arraignment (8). But it is not customary, nor agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant is actually in gaol,) to try persons indicted of smaller misdemeanors at the same court in which they have pleaded *not guilty*, or *traversed* the indictment. But they usually give security to the court, to appear at the next assizes or session, and then and there to try the traverse, giving notice to the prosecutor of the same (9).

(8) With respect to the mode of empannelling juries, &c., see the same statute, (6 Geo. IV. c. 50,) § 4 to § 25, inclusive, an abstract of which would occupy too much space here.

(9) By 60 G. III., and 1 G. IV., c. 4, § 1, persons prosecuted in the Court of King's Bench for any misdemeanor, and having appeared in term time to answer to the indictment, shall not be permitted to imparl to the following term, but shall be required to plead or demur thereto within four days from the time of appearance; and in default of so pleading or demurring, judgment may be entered against such defendants for want of a plea.

By sect. 2, the court, or any judge thereof, upon sufficient cause shewn, may allow further time for any such defendant to plead or demur.

By sect. 3, persons prosecuted for any misdemeanor at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, having been committed, or held to bail, twenty days before the session at which the indictment is found, shall plead to such indictment, and trial shall proceed thereon at such session, unless a *certiorari* to remove the indictment is delivered at such session, before the jury are sworn.

In *Rex v. E. Wakefield*, Cro. Cir. Com. 491, the defendant had been com-

mitted more than twenty days before the assizes for *felony*. The grand jury ignored the bill for felony, but found two bills against the defendant for misdemeanors; application was made for leave to traverse these indictments till the next assizes: the defendant having appeared and pleaded, which was held necessary, the judge decided that he was entitled to his traverse.

In *Rex v. W. Wakefield*, *ibid*, the defendant, being charged with a misdemeanor, had been admitted to bail more than twenty days before the assizes. One true bill was found against him upon that charge, and another for a conspiracy. It was contended that he was entitled, as of right, to traverse the latter indictment; but the judge said, "By the terms of his recognizance he undertakes to appear at these assizes, to answer *all* such matters as shall be preferred against him," and the traverse was refused.

By § 4, writs of *certiorari* may be issued *before* indictment found, in the like cases, and on the same terms, as *after* indictment found.

By § 5, persons so prosecuted, not having been committed or held to bail, twenty days before the session at which the indictment is found, but having been committed or held to bail to appear at some subsequent session, or having received notice of the indictment being

In cases of high treason, whereby corruption of blood may ensue, (except treason in counterfeiting the king's coin (10) or seals,) or misprision of such treason, it is enacted by statute 7 W. III. c. 3, first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed: next, that the prisoner shall have a copy of the indictment, (which includes the caption) (*k*), but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment (*l*); for then is his time to take any exceptions thereto, by way of plea or demurrer; thirdly, that he shall also have a copy of the panel of jurors two days before his trial: and, lastly, that he shall have the same compulsive process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him. And, by statute 7 Ann. c. 21, (which did not take place till after the decease of the late pretender,) all persons, indicted for high treason or misprision *thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced and of the jurors empanelled, with their professions and places of abode (11), delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence (12). But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III. c. 53, else it had been impossible

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(*k*) Fost. 229; Append. i.(*l*) Ibid. 230.

found twenty days before such subsequent session, shall plead to such indictment at such subsequent session, and trial shall proceed thereon at such same session, unless a *certiorari* to remove the indictment is delivered at such session, before the jury are sworn.

And by § 7, the court at any session of the peace, &c., may, upon sufficient cause shewn, allow further time for pleading to any such indictment, or for trial of the same.

(10) No longer treason. Vide *ante* 88, n. (16), & 84 n. (13).

(11) A witness cannot be examined who is described in the list as A.B., *lately* residing at, &c., if it appears, at the trial, that the place named was not the latest place of his residence, and that no endeavour has been made to find him out, after he ceased to reside there; *Watson's case*, 32 Ho. St. Tr. 73.

(12) The ten days must be after bill found, and before arraignment; and are exclusive of the days of delivery and arraignment, and, as it seems, of Sundays; 1 East, P.C. 112.

to have tried those offences in the same circuit in which they are indicted : for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of *oyer* and *terminer* (*m*) (13). And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies, before the time of his trial (*n*).

and sworn as
they appear,

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party (14).

(*m*) Fost. 250.

(*n*) 2 Hawk. P. C. 410.

(13) By 39 & 40 Geo. III. c. 93, in all cases of high treason, in compassing or imagining the death of the king, and of misprision of such treason, where the overt act alleged in the indictment is the assassination of the king, or a direct attempt against his life or person, the party accused shall be indicted and tried in the same manner and upon the like evidence as if charged with murder. But the judgment and execution shall remain the same as in other cases of high treason. And by 6 Geo. IV. c. 50, § 21, when any person is indicted for high treason or misprision of treason, in any court except K. B., a list of the petty jury, with their names, professions, and places of abode, shall be given at the same time that the copy of the indictment is delivered to the party indicted, which shall be ten days before arraignment, and in the presence of two or more credible witnesses; and when any person is so indicted in K. B., a copy of the indictment shall be delivered as before mentioned, but the list of the petty jury, made out as before mentioned, may be delivered to the party indicted, after arraignment, so that it be ten days before trial. Proviso, not to extend to interfere with the provisions of 39 & 40 Geo. III. c. 93, nor to cases of treason relating to the coin.

Where the jury panel is incorrect, a motion may be made on the part of the crown, in the court of gaol delivery, for leave to the sheriff to amend the panel; 1 East, P. C. 113.

(14) By 6 Geo. IV. c. 50, § 27, if any man shall be returned as a juror for the trial of any issue, in any of the courts in the Act mentioned, who shall not be qualified according to the Act, the want of such qualification shall be good cause of challenge, and he shall be discharged upon such challenge, if the court shall be satisfied of the fact; and if any man returned as a juror for the trial of any such issue shall be qualified in other respects according to the Act, the want of freehold shall not on such trial, in any case, civil or criminal, be accepted as good cause of challenge, either by the crown or the party, nor as cause for discharging the man so returned upon his own application. Proviso, not to extend to any special juror.

By sect. 28, no challenge shall be taken to any panel of jurors for want of a knight being returned in such panel, nor any array quashed by reason of any such challenge.

By § 29, in all inquests to be taken before any of the courts in the Act mentioned, wherein the king is a party, howsoever it be, notwithstanding it be alleged by them that sue for the king, that the jurors of those inquests, or some of them, be not indifferent for the king; yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the

Challenges may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes (*o*). For it is here at least as necessary as there, that the sheriff or returning officer be totally indifferent; that when an alien is indicted, the jury should be *de medietate*, or half foreigners, if so many are found in the place (15); (which does not indeed hold in treasons (*p*), aliens being very improper judges of the breach of allegiance (16); nor yet in the case of Egyptians under the statute 22 Hen. VIII. c. 10) (17), that on every panel there should be a competent number of hundredors; and that the particular jurors should be *omni exceptione majores*; not

unless challenged by the crown or the defendant,

(*o*) See vol. III. page 359. (*p*) 2 Hawk. P. C. 420; 2 Hal. P. C. 271.

custom of the court; and it shall be proceeded to the taking of the same inquisition, as it shall be found, if the challenges be true or not, after the discretion of the court; and no person arraigned for murder or felouy shall be admitted to any peremptory challenge above the number of twenty.

And by 7 & 8 Geo. IV. c. 28, § 3, if any person indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge, in any of the said cases, every peremptory challenge, beyond the number allowed by law in any of the said cases, shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.

As to challenges to the array, see vol. III. 359, *et seq.* As to challenges to the polls, see the notes immediately following.

(15) The 6 Geo. IV. c. 50, § 47, provides, that nothing in that Act contained shall extend or be construed to extend to deprive any alien indicted or impeached of any felony or misdemeanor of the right of being tried by a jury *de medietate linguæ*; but that, on the prayer of every alien so indicted

or impeached, the sheriff or other proper minister, shall, by command of the court, return for one half of the jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any; and that no such alien juror shall be liable to be challenged for want of freehold, or of any other qualification required by the Act; but every such alien may be challenged for any other cause, in like manner as if he were qualified by the Act.

(16) The privilege is taken away from persons indicted of high treason by the 1 & 2 P. & M. c. 10, which directs that all trials for that offence shall take place as at common law.

(17) The 28 Edw. III. c. 13, on which this right of aliens was founded, was repealed as to Egyptians by the 1 & 2 P. & M. c. 4, § 3, and the 5 Eliz. c. 20, which enacted that they should be tried by the inhabitants of the county where they were arrested, and not *per medietatem linguæ*; but that provision was repealed by the 23 Geo. III. c. 51, and Egyptians are now dealt with under the Vagrant Acts as rogues and vagabonds. *Vide ante*, 166, *in notis*.

liable to objection either *propter honoris respectum* (18), *propter defectum* (19), *propter affectum* (20), or *propter delictum* (21).

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for cause; or
peremptorily,
as they may be
by the defend-
ant, in treason
or felony.

* Challenges upon any of the foregoing accounts are styled challenges *for cause*; which may be without stint in both criminal and civil trials. Both in criminal cases, or at least in capital ones, there is, *in favorem vitæ*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous (22). This is grounded on two reasons. 1. As every one must be sensible, what sudden

(18) A challenge *propter honoris respectum*, is allowed where a peer or lord of parliament is sworn upon a jury for the trial of a commoner. He may challenge himself, or have a writ of privilege to discharge him; and it seems that either party may challenge him on the ground of his dignity, because he is not within the description of *pares patriæ*, but belongs to a higher order of the state. But members of the House of Commons do not appear strictly to have any title to claim such an exemption on account of that circumstance, and, of course, it cannot operate as a ground of challenge; though the court will discharge them on their request, especially if parliament be actually sitting; 1 Chit. Cr. L. 540, and the authorities there collected.

(19) A challenge *propter defectum* may be either on account of some personal objection, as alienage, infancy, old age, or a deficiency in the requisite property; 1 Chit. Cr. L. 541.

(20) A challenge *propter affectum*, is on the ground of some presumed or actual partiality. If, therefore, the juror is related to either party within the ninth degree, though only by marriage, a challenge will be admitted. So, if he has acted as godfather to a child of either party. So, if he be under the power, or in the employ, of

either party, or is to receive part of a fine on conviction, or has been chosen arbitrator in case of a personal injury for one of the parties, or has eaten and drank at his expense. So, if there are actions depending between the juror and one of the parties. So, if a juror has expressed his wishes as to the result of the trial, or his opinion of the guilt or innocence of the defendant, with a malicious intention. By 25 Edw. III. c. 3, a man who has acted as a grand juror on the finding of an indictment, may be challenged if returned to serve on the petty jury. And that statute has been construed to extend, not only to the same indictment, but also to any other indictment for the same offence, or where the matter which there came in question happens here to be material; 1 Chit. Cr. L. 541, and the authorities there collected.

(21) If a juror has been convicted or attainted of treason, felony, perjury, conspiracy, or any infamous offence, or has been attainted of *præmunire* or forgery, or outlawed, or excommunicated, he may be challenged *propter delictum*; 1 Chit. Cr. L. 543.

(22) A peremptory challenge is not allowed in the trial of collateral issues; Fost. 42. Nor in any trial for a misdemeanor; 2 Harg. St. Tr. 808; and 4 H. St. Tr. 1.—CH.

impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner, when put to defend his life, should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

This privilege of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. stat. 4, which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held, that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king's counsel must shew the cause: otherwise the juror shall be sworn (q) (23).

Peremptory challenges are allowed, to the prisoner only,

The peremptory challenges of the prisoner must, however, have some reasonable boundary; otherwise he might never *be tried. This reasonable boundary is settled by the common law to be the number of thirty-five; that is, one under the number of three full juries. For the law judges that five and thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And therefore it deals with

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to the number of thirty-five by the common law,

(q) 2 Hawk. P. C. 413; 2 Hal. P. C. 271.

(23) And the practice is the same both in trials for misdemeanors and for capital offences; 3 Harg. St. Tr. 519. Where there is a challenge for cause, two persons in court not of the jury are sworn to try whether the juryman challenged will try the prisoner indifferently. Evidence is then produced to

support the challenge, and according to the verdict of the two triers, the juryman is admitted or rejected. A juryman was thus set aside in O'Coigly's trial for treason, because, upon looking at the prisoners, he had uttered the words, "damned rascals;" see O'Coigly's trial.—CH.

one, who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who stands mute or refuses his trial; by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason (*r*). And so the law stands at this day with regard to treason of any kind (24).

but by statute
22 Hen. VIII.
to the number
of twenty only,

But by statute 22 Hen. VIII. c. 14, which, with regard to felonies, stands unrepealed by statute 1 & 2 Ph. and Mar. c. 10; by this statute, I say, no person arraigned for felony, can be admitted to make any more than *twenty* peremptory challenges. But how if the prisoner will peremptorily challenge twenty-one? what shall be done? The old opinion was, that judgment of *peine forte et dure* should be given, as where he challenged thirty-six at the common law (*s*): but the better opinion seems to be (*t*), that such challenge shall only be disregarded and overruled. Because, first, the common law doth not inflict the judgment of penance for challenging twenty-one, neither doth the statute inflict it; and so heavy a judgment (or that of conviction, which succeeds it) shall not be imposed by implication. Secondly, the words of the statute are, "that he be not *admitted* to challenge more than twenty;" the evident construction of which is, that any further challenge shall be disallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn (25).

until twelve are
duly sworn.

If, by reason of challenges or by default of the jurors, a sufficient number cannot be had of the original panel, a *tales* [*355] *may be awarded as in civil causes (*u*) (26), till the number

(*r*) 2 Hal. P. C. 268.

(*s*) 2 Hawk. P. C. 414.

(*t*) 3 Inst. 227; 2 Hal. P. C. 270.

(*u*) See vol. III. page 364. But,
in mere commissions of gaol delivery,

no *tales* can be awarded; though the court may *ore tenus* order a new panel to be returned *instantanter*. (4 Inst. 68, 4 St. Tr. 728, *Cooke's case*.)

(24) Vide 7 & 8 Geo. IV. c. 28, § 3, *ante* 352, latter part of note (14).

(25) Vide *id.* *ibid.* No challenge can be made either to the array or to the polls, before a full jury have made their appearance; 1 Chit. Cr. L. 544. And see *Rex v. Edmonds*, 4 B. & A. 471. Nor after they are sworn. The proper time for challenging is between

the appearance and the swearing. The challenge to the array must be in writing; but not so that to the polls; 1 Chit. Cr. L. 546.

(26) If the trial is under a commission of gaol delivery, there must be a fresh panel, a *tales* cannot be awarded. But if under a particular writ of *venire facias*, a *tales* may be

of twelve is sworn, "well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge; and a true verdict to give, according to the evidence."

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the counsel for the crown or prosecution. But it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his

The defendant cannot defend by counsel, in any capital case, except treason.

awarded. To this the sheriff may return entirely new men, who were not in the former panel. No juryman who has been challenged on the original panel ought to be sworn on the tales. Upon this return, the prisoner may challenge any of those who were sworn before peremptorily if they are now returned; but he cannot challenge them for cause without shewing that the objection arose after the original swearing. And he can only challenge peremptorily from the tales so many as will complete his number of twenty in case of felony, and thirty-five in treason, together with the challenges he made to the original jury; 1 Chit. Cr. L. 550. After a tales panel on an indictment for libel (appointed to be tried by a special jury) had been quashed for unindifferency in the sheriff; the court of K. B. held, that a *venire facias juratores* might be awarded to the coroners, though two of the special jurors summoned had attended on the former occasions; *Rex v. Dolby*, 3 D. & R. 311; 2 B. & C. 104. Upon the prayer and award of a tales *de circumstantibus* at nisi prius, it is not compulsory on the coroner or sheriff to select the talesmen from the bystanders accidentally in court; they may be selected out of persons previously appointed by the coroner or sheriff, to be in attendance in the expectation that a tales would become necessary; *id. ibid.* On an indictment on 9 Geo. I. c. 22, for setting fire to a barn, in support of a challenge

to the panel, because the sheriff is an inhabitant of the hundred, it is necessary to prove, that the notice has been given within two days of the injury, and that the examination has been delivered, which the statute requires; *Rex v. Savage*, R. & M. C. C. 51. Where, on the trial of an indictment for perjury, it was necessary to swear talesmen from the common jury panel, and one J. Williams being called, his son, R. H. Williams, (at the request of his father, and without collusion,) appeared for him, and was sworn and served on the jury, he not being of age, nor having a qualification, nor being on the panel: it was held that there was a mis-trial; *Rex v. Tremaine*, 7 D. & R. 684; 5 B. & C. 254. If a juryman is taken ill, so as to be incapable of attending through the trial, the jury may be discharged and the prisoner tried *de novo*, or another juryman may be added to the eleven; but in that case the prisoner should be offered his challenge over again as to the eleven, and the eleven should be sworn *de novo*; *Rex v. Edwards*, R. & R. C. C. 224. A special juror can be challenged for alienage, only at the time when the jury is struck; and if a party then has an opportunity of making his challenge, and neglects it, he cannot afterwards make the objection; *Rex v. Sutton*, 8 B. & C. 417, 2 M. & R. 406. *Quære*, whether, since the 6 Geo. IV. c. 50, § 27, passed, alienage is a ground even of challenge to a special juror? *Id. ibid.*

trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated (*w*) (27). A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular,) (*x*) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor, indeed, is it, strictly speaking, a part of our ancient law: for the *Mirroure* (*y*), having observed the necessity of counsel in civil suits, "who know how to forward and defend the cause, by the rules of law and customs of the realm," immediately afterwards subjoins: "and more necessary are they for defence upon indictments and appeals of felony, than upon other venial causes (*z*) (28)." And the judges themselves are so sensible

(*w*) 2 Hawk. P. C. 400.

(*x*) Sir Edward Coke (3 Inst. 137) gives another additional reason for this refusal, "because the evidence to convict a prisoner should be so manifest, as it could not be contradicted." Which Lord Nottingham (when high steward) declared (3 St. Tr. 726) was the only good reason that could be given for it.

(*y*) C. 3, § 1.

(*z*) Father Parsons, the jesuit, and, after him, bishop Ellys, (of English

Liberty, ii. 26,) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Hen. I.; meaning, I presume, chapters 47 & 48 of the code which is usually attributed to that prince. "*De causis criminalibus vel capitalibus nemo quærat consilium; quin implacitatus statim perneget, sine omni petitione consilii. In aliis omnibus potest et debet uti consilio.*" But this *consilium*, I conceive, signifies only an *emparlance*,

(27) The defendant in an *appeal*, whether capital or not capital, has the same benefit of counsel, as in any other private action; see 2 Hawk. P. C. c. 39, § 3.

(28) The prisoner is not allowed counsel to plead his cause before the jury in any felony, whether capital, or otherwise. But in misdemeanors the prisoner or defendant is allowed counsel as in civil actions.

If the counsel for the defendant on the trial of an indictment for a misdemeanor (perjury), opens new facts in

his address to the jury, and afterwards declines calling witnesses to prove the facts so opened, the counsel for the prosecution is still entitled to a general reply; *Rex v. Bignold*, 4 D. & R. 70.

The maxim that the judge is counsel for the prisoner signifies nothing more than that the judge shall take care that the prisoner does not suffer from the want of counsel.

The judge is counsel only for public justice, and to promote that object alone, all his inquiries and attention ought to be directed.

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of this defect, that they never scruple to allow a prisoner counsel to instruct him what questions to *ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law, arising on the trial, they are *entitled* to the assistance of counsel. But lest this indulgence should be intercepted by superior influence, in the case of state criminals, the legislature has directed by statute 7 W. III. c. 3, that persons *indicted* for such treason, as works a corruption of the blood, or misprision thereof, except treason in counterfeiting the king's coin or seals, may make their full defence by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge: and the same indulgence, by statute 20 Geo. II. c. 30, is extended to parliamentary *impeachments* for high treason, which were excepted in the former act (29) (30).

and the *petitio consilii* is *craving leave to emparl*; (see vol. III. page 298;) which is not allowable in any criminal prosecution. This will be manifest by comparing this law with a contemporary passage in the *Grand Coustumier* of Normandy, (ch. 85,) which speaks of *emparlance* in personal actions. “*Après ce, est tenu le querelle a res-*

pondre ; et aura congie de soy conseiller, s'il le demande : et quand il sera conseil, il peut nyer le faict dont il est accuse.” Or, as it stands in the Latin text, (edit. 1539 :) “*Querelatus autem postea tenetur respondere ; et habebit licentiam consulendi, si requirat ; habito autem consilio, debet factum negare quo accusatus est.*”

(29) Upon the trial of issues which do not turn upon the question of guilty or not guilty, but upon collateral facts, prisoners under a capital charge, whether for treason or felony, always were entitled to the full assistance of counsel; Fost. 232, 42. It is very extraordinary that the law of England should have denied the assistance of counsel, when it is wanted most, *viz.* to defend the life, the honour, and all the property of an individual. It is the extension of that maxim of natural equity, that every one shall be heard in his own cause, that warrants the admission of hired advocates in courts of justice; for there is much greater inequality in the powers of explanation and persuasion in the natural state of the human mind, than when it is improved by education and experience. Amongst professional men of esta-

blished character, the difference in their skill and management is generally so inconsiderable, that the decision of the cause depends only upon the superiority of the justice in the respective cases of the litigating parties. Hence the practice of an advocate is absolutely necessary to the administration of substantial justice. An honourable barrister will never mistake either law or facts within his own knowledge, but he is justified in urging any argument, whatever may be his own opinion of the solidity or justness of it, which he may think will promote the interests of his client; for reasoning in courts of justice and in the ordinary affairs of life seldom admits of geometrical demonstration; but it happens not unfrequently that the same argument, which appears sophistry to one, is sound logic in the

The evidence is regulated as in civil cases,

The doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There

mind of another, and every day's experience proves that the opinions of a judge and an advocate are often diametrically opposite. Many circumstances may occur, which will justify or compel an individual member of the profession to refuse the defence of a particular client, but a cause can hardly be conceived which ought to be rejected by all the bar; for such a conduct in the profession would excite so strong a prejudice against the party, as to render him in a great degree condemned before his trial. Let the circumstances against a prisoner be ever so atrocious, it is still the duty of the advocate to see that his client is convicted according to those rules and forms, which the wisdom of the legislature has established as the best protection of the liberty and the security of the subject. But the conduct of counsel in the prosecution of criminals, ought to be very different from that which is required from them in civil actions, or when they are engaged on the side of a prisoner; in the latter cases they are the advocates of their client only, and speak but by his instruction and permission; in the former they are the advocates of public justice, or to speak more professionally, they are the advocates of the king, who, in all criminal prosecutions, is the representative of the people, and both the king and the country must be better satisfied with the acquittal of the innocent, than with the conviction of the guilty. Hence in all criminal prosecutions, especially where the prisoner can have no counsel to plead for him, a barrister is as much bound to disclose all those circumstances to the jury, and to reason upon them as fully,

which are favourable to the prisoner, as those which are likely to support the prosecution.—CH.

(30) This subject has of late years repeatedly engaged the attention of our legislators, and several attempts to pass a law, allowing defendants in all cases of felony to defend themselves by counsel, have been made without success.* The inconsistency and hardship of the existing rule of law seem to be pretty generally admitted, and the majority of those who have opposed its abrogation appear to have been actuated principally by an apprehension of the inconveniences that might follow. The time which would be occupied by counsel in addressing the jury on behalf of the prisoner, and the probable effect of their addresses in misleading the jury, and defeating the ends of justice by rescuing the guilty from conviction, are among the chief of the inconveniences that have been suggested; and, it has been said, that the first would render it impossible to despatch the business of our assizes and sessions within the periods hitherto allotted for them, and that the second would tend to produce an increase of crime, by increasing the chance, or at least the expectation of impunity. It has been contended in answer, that the time now occupied by the prisoner's counsel in cross-examining the witnesses for the prosecution, and arguing objections before the court, both which are to a great degree resorted to as *indirect* modes of addressing to the jury points and propositions favourable to the prisoner, would be saved by allowing a *direct* address to the jury; and that the summing up of the judge, in which the arguments as well

* A bill of this nature is now, (June 1836), pending before parliament. Should its fate be decided before this

volume leaves the press, the result will be found among the Addenda.

are, however, a few leading points, wherein by several statutes and resolutions, a difference is made between civil and criminal evidence.

First, in all cases of high treason, petit treason, and mis-<sup>with some ex-
ceptions.</sup>prision of treason, by statutes 1 Edw. VI. c. 12, and 5 and 6 Edw. VI. c. 11, *two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same. By statute 1 and 2 Ph. and Mar. c. 10, a further exception is made as to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm; and more particularly by c. 11, the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The statutes 8 and 9 W. III. c. 25, and 15 *and 16 Geo. II. c. 28, in their subsequent extensions of this species of treason do also provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence and in such manner and form, as may be had and used against offenders for counterfeiting the king's money. But by statute 7 W. III. c. 3, in prosecutions for those treasons to which that act extends, the same rule, of requiring *two* witnesses, is again enforced; with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*. In the construction of which act it hath been holden (*a*), that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty

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(*a*) Foster, 240, 244.

as the facts on both sides would be skilfully and impartially reviewed, and presented in their real bearing to the jury, would effectually prevent the danger of the jury being misled by counsel, on one side or the other. Between arguments at once so contradictory of each other, and so plausible in themselves, it is difficult to decide. Perhaps, the safest and most equitable course might be, to prohibit the counsel on either side, in general, from addressing the jury, giving the presiding judge a discretionary power to grant the privilege to both parties,

where it is made to appear to him, that the intricacy of the facts, or other peculiar circumstances of the case, render it desirable for the purposes of justice. With respect to the concluding observation in the learned professor's note, *suprà*, it is but justice to the profession to remark, that it is the undeviating practice of counsel, approved by all our judges, carefully to abstain from reasoning upon circumstances when stating the case against the prisoner, and strictly to confine themselves to a faithful and impartial narration of facts.

unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute (31). And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence (32). By the same statute 7 W. III. it is declared that both wit-

(31) It appears now to be an established rule, that a full and voluntary confession by the prisoner of the overt acts charged against him, is of itself sufficient evidence to warrant a conviction. And although Mr. Justice Foster suggests *Fost. Disc.* 243, that "the rule, for admitting a confession against the prisoner, ought not to extend further than to a confession made during the solemnity of an examination before a magistrate, or before some person having authority to take it, when the party may be presumed to be properly upon his guard and apprized of his danger," no distinction of this kind is to be found in the authorities. On the contrary, in *Francia's case*, 1 East, P. C. 133, the judges resolved that the confession would be evidence, whether made before a magistrate, or in the course of conversation. And there appears to be no solid ground for such a distinction; as confessions are admissible in trials for high treason, precisely on the same principle, which made them evidence at common law; *Phil. Ev.* 90, third ed. And see the authorities there referred to.

(32) It seems to be now clearly established, that a free and voluntary confession by a person accused of an offence, whether made before his apprehension or after, whether on a judicial examination or after commitment, whether reduced into writing or not, in short, that any voluntary confession, made by a prisoner to any person, at any time or place, is strong evidence

against him; and, if satisfactorily proved, sufficient to convict without any corroborating circumstance. But the confession must be voluntary, not obtained by improper influence, nor drawn from the prisoner by means of a threat or promise: for however slight the promise or threat may have been, a confession so obtained cannot be received in evidence, on account of the uncertainty and doubt whether it was not made rather from a motive of fear or of interest, than from a sense of guilt; *Phil. Ev.* 86. It has been determined by the opinion of all the judges, that, although confessions improperly obtained are not admissible, yet, that any facts, which have been brought to light in consequence of such confessions, may be properly received in evidence. Thus, where a prisoner was charged, as accessory after the fact, with having received property knowing it to be stolen, proof was admitted of the property being found in the prisoner's lodgings, although the knowledge of that fact had been gained from an inadmissible confession; *Warwickshall's case*, 1 Leach, 300; *Mosey's case*, id. 301, n. (a); *Lockhart's case*, id. 430, 2 East, P. C. 658; *Rex v. Griffin*, R. & R. C. C. 150. Some, indeed, have thought, that the circumstance of the fact being known in consequence of information received from the prisoner, ought not to be shewn at the trial. But a different practice appears to be established by later authorities; and, on a prose-

nesses must be to the same overt act of treason, or one to one overt act and the other to another overt act, of the same

cution for receiving stolen goods, evidence has been admitted that the prisoner described the place where the goods were concealed, and that afterwards they had been found there; but that part of the confession in which he acknowledged that he himself had concealed them, was rejected, as it was improperly drawn from him; *Grant's case*, and *Hodge's case*, 2 East, P. C. 658, 1 Leach, 301, n. (a); and see *Rex v. Jones*, R. & R. C. C. 152. There is good reason for this distinction; for what the prisoner has said respecting the concealment of the property is ascertained to be true by the fact of the subsequent discovery; but the other part of the confession, in which he charges himself with having concealed it, may have been made untruly, and entirely under the influence of the threat or promise; Phil. Ev. 88. And if a confession has been obtained from a prisoner by undue means, no statement afterwards made by him, under the influence of that confession, can be received; *Rex v. White*, 1 Phil. Ev. 104; nor any act done by him in consequence towards discovering the property, unless the property is actually discovered thereby; *Rex v. Jenkins*, R. & R. C. C. 492. But a confession is evidence, though previously to it an inducement to confess had been held out by another person, having no authority to do so. A prisoner committed on a charge of murder, sent for the chaplain of the gaol to pray with him: the chaplain told him that, as the minister of God, he ought to warn him not to add sin to sin by attempting to dissemble with God, and that it would be important for him to confess his sins before God, and to repair, as far as he could, any injury he had done. The chaplain stated that he considered he had made a great impression, and that he told the prisoner he did not wish

him to confess to him. There were two interviews, and the chaplain said he was almost sure that he always used the terms "confessing his sins before God;" but was not quite positive that he mentioned the words "before God" every time. After this the prisoner sent for the gaoler, who warned him not to tell him any thing but what he wished to be repeated to the magistrates. The prisoner then made a confession. After this the prisoner sent for the mayor, who said, "before you say any thing, I must apprise you, (as I have done several times,) that it will be, probably, given in evidence against you; you are therefore to exercise your own discretion, and say little or nothing, as you think best: and, if you have changed your mind, and do not choose to say any thing, I will retire and shall not feel at all angry at your having brought me down." The prisoner made another confession, which was taken down and read over to him, and he admitted its correctness, but he could not sign it, as his hand shook so much. These confessions were objected to by the prisoner's counsel, but after argument the twelve judges held that they were rightly received; *Rex v. Gilham*, Car. Cr. L. 61. And see *Rex v. Gibbons*, 1 C. & P. 97; *Rex v. Tyler*, id. 129; *Rex v. Row*, R. & R. C. C. 153; and other cases to the same point referred to in 1 Phil. Ev. 104-5. Where a prisoner in gaol on a charge of felony asked the turnkey to put a letter in the post for him, and on his promising to do so, gave him a letter addressed to his father, which the turnkey handed to the prosecutor; the letter was held admissible in evidence against the prisoner, notwithstanding the manner in which it was obtained; *Rex v. Derrington*, 2 C. & P. 418. A. was charged with setting fire to the ricks of B., C., and D., upon the oath

species of treason (*b*), and not of distinct heads or kinds : and no evidence shall be admitted to prove any overt act not ex-

(*b*) See St. Tr. ii. 144 ; Foster, 235.

of E., an accessory before the fact, and a warrant to apprehend A. was granted, mentioning all the three charges, and stating them to be made on the oath of E. The person who apprehended A. told her that "a very serious oath had been made against her by E.," on these three charges. After this A. made a statement, which was received in evidence ; *Rex v. Charlotte Long*, 6 C. & P. 179. A constable said to a prisoner charged with felony, "It is of no use for you to deny it, for there is the man and boy who will swear they saw you do it:" this was held to be such an inducement as excluded evidence of what the prisoner said ; *Rex v. Mills*, id. 146. A prisoner before the magistrate made a statement, which by mistake was written in the information-book, and headed, "the information and complaint of A. B." Held, that it was not receivable, though the mistake could have been explained by the magistrate's clerk ; *Rex v. Bentley*, id. 148. Several persons, one of whom was the prisoner, were summoned before the committing magistrate touching the poisoning of C. No person was then specifically charged with the offence. The prisoner was sworn and made a statement, and at the end of the examination was committed for trial. Held, that this statement was not receivable in evidence against the prisoner ; *Rex v. Lewis*, id. 161. A. gave a mortal blow to B. his master, who took out a summons against A. for an assault. The charge of assault was heard before Mr. D. and another magistrate, who summarily convicted A. of the assault. What was said by the parties before the magistrates was not taken down in writing. B. died. Held, that, on the trial of A. for the murder of B., Mr. D. might give evidence of

what B. said in the presence of A. before the magistrates, and of what A. said in answer to it ; *Rex v. Edmunds*, id. 164. If the witness said to the prisoner, "It would have been better if you had told at first," this is an inducement to confess, and will render a statement made thereupon inadmissible ; *Rex v. Walkley*, id. 175. Where, before the committing magistrates, one of the prisoners was examined as a witness against the other, and, after being examined, was charged as a prisoner : held, that what such prisoner said before the magistrate as a witness could not be given in evidence against her on her trial for the offence ; *Rex v. Davis*, id. 177. A prisoner charged with felony made a statement before the committing magistrate, which was taken down, and signed by the prisoner, but there was nothing on the face of the paper to shew that, at the time the prisoner made the statement, he was under examination on a charge of felony. Held, that this could not be read as an examination taken under 7 Geo. IV. c. 64, but that the magistrate's clerk might state what the prisoner said, using the paper to refresh his memory ; *Rex v. Tarrant*, id. 182. And see *Rex v. Pressly*, id. 183, S. P. If a prisoner be told, "You had better split, and not suffer for all of them," this is such an inducement to confess as will exclude what the prisoner said afterwards ; *Rex v. Thomas*, id. 353. A. was in custody on a charge of murder. B., a fellow prisoner, said to him, "I wish you would tell me how you killed the boy—pray split." A. replied, "Will you be upon your oath not to mention what I tell you?" B. went upon his oath that he would not tell. A. then made a statement. Held, that this was not such an inducement to

pressly laid in the indictment. And therefore, in Sir John Fenwick's case, in king William's time, when there was but one witness, an act of parliament (c) was made on purpose to attain him of treason, and he was executed (d). But in almost every other accusation one positive witness is suffi-

(c) Stat. 8 W. III. c. 4.

(d) Stat. Tr. v. 40.

confess as rendered the statement inadmissible; *Rex v. Shaw*, id. 372. A. and his wife were separately in custody charged with receiving stolen goods. A person in the room with A. said, "I hope you will tell, for Mrs. G. can ill afford to lose the money." The constable then said, "If you will tell where the property is, you shall see your wife." Held, that a statement afterwards made by A. was admissible in evidence; *Rex v. Lloyd*, id. 393. Where a prisoner, who made a confession to a constable, in consequence of a promise held out, was taken before a magistrate, who, knowing what had taken place, cautioned the prisoner, against making any confession before him, but the prisoner, notwithstanding, did make a confession to the magistrate: held, that this second confession was receivable in evidence on the trial of the prisoner, though it did not appear that the magistrate told the prisoner that his first confession would have no effect, and he therefore might have acted under an impression that, having once acknowledged his guilt, it was too late to retract; *Rex v. Howes*, id. 404. What a prisoner is overheard to say to his wife, or to himself, is receivable in evidence against him on a charge of felony; *Rex v. Simons*, id. 540. A prisoner charged with felony being in custody handcuffed in the house of the prosecutor, after a conversation with the prosecutor and another person, in which he was told that they would do all they could for him, said, "If the handcuffs are taken off, I will tell you where I put the property;" held, that this statement was receivable in evi-

dence, and could not be objected to, either as a confession made under a promise, or a statement obtained by duress; *Rex v. Green*, id. 655. A prisoner's confession is sufficient ground for a conviction, though there is no other proof of his having committed the offence, or of the offence having been committed, if the confession was in consequence of a charge against the prisoner; *Rex v. Eldridge*, R. & R. C. C. 440. And see *Rex v. Falkner*, id. 481; *Rex v. White*, id. 508; *Rex v. Tippet*, id. 509, to the same point. A confession made on examination before a magistrate, ought to be taken in writing and signed by the magistrate, and parol evidence of it will not be received, unless it is clearly proved not to have been reduced into writing. The confession ought to be read over to the prisoner, and he should be asked to sign it, but his refusing to do so will not render it inadmissible, if it has been in other respects regularly obtained; *Rex v. Jones*, Car. Cr. L. 13. The prisoner's statement must not be taken upon oath, and if he has been sworn, it cannot be received in evidence. A confession is evidence only against the person confessing, not against others, although they are proved to be his accomplices. But if a prisoner, in making a statement, mentions the name of another prisoner, the witness who gives evidence of the statement must state exactly what the prisoner said, without omitting the name of the other prisoner; *Rex v. Walkley*, 6 C. & P. 175. See Phil. Ev. c. 5, § 5, and the authorities there collected on this subject.

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cient. Baron Montesquieu lays it down for a rule (*e*), that those laws which condemn a man to death *in any case* on the deposition of a single witness, are fatal to liberty: and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance (*f*); there is a necessity therefore to call *in a third man to incline the scale. But this seems to be carrying matters too far: for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness; must these, therefore, escape unpunished? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another (*g*). In cases of treason also there is the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him; though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

Secondly, though from the reversal of Colonel Sidney's attainder by act of parliament in 1689 (*h*) it may be collected (*i*), that the mere similitude of handwriting in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury (*j*) (33).

(*e*) Sp. L. b. 12, c. 3.

(*f*) Beccar. c. 13.

(*g*) 10 Mod. 194.

(*h*) St. Tr. viii. 472.

(*i*) 2 Hawk. P. C. 431.

(*j*) Lord Preston's case, A.D. 1690; St. Tr. iv. 453; Francia's case, A.D. 1716; St. Tr. vi. 69; Layer's case, A.D. 1722; *ibid.* 279; Hensey's case, A.D. 1758; 4 Burr. 644.

(33) But the proof of handwriting is not evidence in high treason, unless the papers are found in the custody of the prisoner; *Rex v. Hensey*, 1 Burr.

644. Whatever degree of weight the testimony of such a witness may deserve, which is a question exclusively for the jury, it is an established rule,

Thirdly, by the statute 21 Jac. I. c. 27, a mother of a bastard child, concealing his birth, must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it (*k*) (34).

Fourthly, all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. *And Sir Matthew Hale in particular (*l*) lays down two rules, most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and 2. Never to convict any person of murder or manslaughter, till at least the body be found dead (35); on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing (36).

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(*k*) See page 198.

(*l*) 2 Hal. P. C. 290.

that if he has seen the person write, he will be competent to speak to his handwriting. See the authorities collected in Phil. Ev. 421-3, 3d ed.

(34) Repealed by 43 Geo. III. c. 58, which is also repealed by 9 Geo. IV. c. 31. See § 14 of the latter statute, *ante* 198, note (44.)

(35) But, on the trial of an indictment for murder, the death of the person charged to have been killed, may be collected from the circumstances, if incapable of being proved by other evidence; as where the deceased was thrown overboard into the sea, and never heard of afterwards; *Rex v. Hindmarsh*, 2 Leach, C. C. 569.

(36) It seems proper here briefly to notice the law respecting the admissibility, in evidence on trials for murder, &c., of the declarations of deceased parties. Dying declarations, that is, declarations made under the apprehension of death, are constantly admitted in criminal prosecutions. But before such declarations can be admitted in evidence against a prisoner, it must be satisfactorily proved, that the deceased

at the time of making them was conscious of his danger, and had given up all hope of recovery. Any hope of recovery, however slight, existing in the mind of the deceased, at the time of his making a declaration, will render it inadmissible as a declaration in *articulo mortis*; but where a deceased knew that he must die, and the magistrate, previous to his declaration, desired him, as a dying man, to tell the truth, and he replied that he would; his declaration was held admissible; *Rex v. Hayward*, 6 C. & P. 157. The consciousness of approaching death is to be collected either from the circumstances of the case, or from expressions used by the deceased. Thus, in *Rex v. Bonner*, 6 C. & P. 386, it was held, that in order to make a declaration in *articulo mortis* admissible in a case of manslaughter, it was not necessary to prove expressions of the deceased, that he was in apprehension of almost immediate death, but that the judge could consider, from all the circumstances, whether the deceased had, or had not, any hope of recovery. The

Lastly, it was an ancient and commonly received practice (*m*), derived from the civil law, and which also to this day obtains in the kingdom of France (*n*), that, as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered, to the honour of Mary I., whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous (*o*), that when she appointed Sir Richard Morgan chief justice of the Common Pleas, she enjoined him, "that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party; her highness's pleasure was, that whatsoever could be brought in favour of the subject should be admitted to be heard: and moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her sub-

(*m*) St. Tr. i. passim.

Montesq. Sp. L. b. 29, c. 11.

(*n*) Domat. Publ. Law. b. 3, t. 1,

(*o*) See page 17.

question, whether the deceased made the declarations under the apprehension of death, is a question of law for the judge to determine; though many learned judges direct the jury, that, if they believe the declarations were not made under the apprehension of death, they ought to reject them from their consideration. Dying declarations have been admitted in evidence, although it appeared that the deceased made a subsequent statement, which had been taken in writing before a magistrate, but the written examination was not ready to be produced at the trial. The dying declarations of an accomplice are admissible; for the accomplice himself would have been a competent witness, if he had been living. The declarations of a criminal at the time of his execution cannot be received at the trial of an accomplice; for, after attainder, he could not be sworn as a witness; Phil. Ev. 215-17, 3d ed.; and see the authorities there referred to. The depositions of the deceased in case of murder are evidence against

the prisoner, though taken in his absence, if afterwards read over to the deceased and assented to by him in the presence of the prisoner; *Rex v. Smith*, 2 Stark. 208, Holt, N. P. C. 614; R. & R. C. C. 339. It is a general rule in criminal cases, that dying declarations are admissible only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration; therefore, where a defendant had been convicted of perjury, and obtained a rule nisi for a new trial, pending which he shot the prosecutor; and, on shewing cause against the rule for a new trial, an affidavit of the dying declarations of the prosecutor, relating to the transaction out of which the prosecution for perjury arose, was produced, it was held by the court of King's Bench to be inadmissible: *Rex v. Mead*, 4 D. & R. 120; 2 B. & C. 605; and see the authorities there cited. See also, *ante* 214, concluding part of note (14).

ject (*p*).” Afterwards, in one particular instance, when embezzling the queen’s military stores was made felony by statute 31 Eliz. c. 4 (37), it was provided that any person, impeached for such felony, “should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defence:” and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was *gradually introduced of examining witnesses for the prisoner, but not upon oath (*q*): the consequence of which still was, that the jury gave less credit to the prisoner’s evidence, than to that produced by the crown. Sir Edward Coke (*r*) protests very strongly against this tyrannical practice: declaring that he never read in any act of parliament, book, case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there was not so much as *scintilla juris* against it (*s*). And the House of Commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland (*t*), when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it (*u*) against the efforts of both the crown and the House of Lords, against the practice of the courts in England, and the express law of Scotland (*w*), “that in all such trials for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses, to be examined upon oath, as can be produced for his clearing and justification.” At length by the statute 7 W. III. c. 3, the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 Ann. st. 2, c. 9, that in all cases of treason and felony, all

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(*p*) Hollingsh. 1112; St. Tr. i. 72.

(*q*) 2 Bulst. 147; Cro. Car. 292.

(*r*) 3 Inst. 79.

(*s*) See also 2 Hal. P. C. 283, and his summary, 264.

(*t*) Stat. 4 Jac. I. c. 1.

(*u*) Com. Journ. 4, 5, 12, 13, 15, 29; 30 Jun. 1607.

(*w*) Ibid. 4 Jun. 1607.

(37) Repealed by 7 & 8 Geo. IV. c. 27.

witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him (38).

The verdict must be open, and may be special where the jury have doubts in point of law; but the jury may decide both upon the law and the facts, without regard to the direction of the judge.

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When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity (*x*), till they have given in their verdict (39) (40); but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case which touches life or member, give a *privy* verdict (*y*) (41). But the judges may adjourn, while the jury are withdrawn to confer, and return to receive the verdict in open court (*z*). And such public or open verdict may be either general, guilty or not guilty, or *special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they *doubt* the matter of law,

(*x*) Co. Litt. 227; 3 Inst. 110; P. C. 439.

Fost. 27; *Gould's case*, Hil. 1764.

(*y*) 2 Hal. P. C. 300; 2 Hawk.

(*z*) 3 St. Tr. 731; 4 St. Tr. 231,

455, 485.

(38) As to the competency of witnesses generally, see Phillips on *Evidence*, and the other text writers on the same subject, *sparsim*. One recent enactment it may be proper to notice: By 9 Geo. IV. c. 32, § 3, every punishment for felony, after it has been endured, shall have the effect of a pardon under the great seal; and by § 4, no misdemeanor, except perjury, shall render a party an incompetent witness, after he has undergone the punishment. Note (30), *ante* 136, must be read with reference to the last-mentioned enactment.

(39) It is now settled, that when a criminal trial runs to such a length that it cannot be concluded in one day, the court, by its own authority, may adjourn till the next morning; but the jury must be somewhere kept together, that they may have no communication but with each other; *Stone's case*, 6 T. R. 527.—CH.

(40) If after indictment, arraign-

ment, the jury charged, and evidence given, on a *capital* offence, one of the jury becomes incapable through illness of proceeding to verdict, the court of oyer and terminer may discharge the jury, and charge a fresh jury; *Rex v. Edwards*, 4 Taunt. 309, 3 Camp. 207. If at the assizes a prisoner is tried for a *misdemeanor* under the commission of gaol delivery, and during the trial becomes ill, and is obliged to be assisted out of court, the judge will discharge the jury; *Rex v. Streek*, 2 C. & P. 413. And see *Rex v. Kinneer*, 2 B. & A. 462; *Rex v. Woolf*, 1 Chit. R. 401.

(41) In general the assent of all the jury to the verdict pronounced by the foreman in their presence and hearing is to be conclusively inferred; but, if all the jury are not present when a verdict of guilty is delivered against a defendant, and it is uncertain whether they all heard the verdict pronounced, the court will grant a new trial; *Rex v. Wooller*, 2 Stark. 111.

and therefore *choose* to leave it to the determination of the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and, if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attainat at the suit of the king (42); but not at the suit of the prisoner (*y*). But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal; and is treated as such by Sir Thomas Smith, two hundred years ago; who accounted such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England (*z*).” For, as Sir Matthew Hale well observes (*a*), it would be a most unhappy case for the judge himself, if the prisoner’s fate depended upon his directions: unhappy also for the prisoner: for, if the judge’s opinion must rule the verdict, the trial by jury would be useless. Yet in many instances (*b*), where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the

(*y*) 2 Hal. P. C. 310.

(*z*) Smith’s Commonw. l. 3, c. 1.

(*a*) 2 Hal. P. C. 313.

(*b*) 1 Lev. 9; T. Jones, 163; St.

Tr. x. 416.

(42) By 6 Geo. IV. c. 50, § 60, it is enacted that, from and after the passing of that Act, it shall not be lawful either for the king, or any one on his behalf, or for any party or parties, in any case whatsoever, to commence or prosecute any writ of attainat against any jury or jurors, for the verdict by them given, or against the party or parties who shall have judgment upon such verdict; and that no inquest shall be taken to inquire of the concealments of other inquests, but that all such attainats and inquests shall thenceforth cease, become void, and be utterly abolished.

And by § 61, it is provided, enacted, and declared, that, notwithstanding any

thing in the Act contained, every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and be punished by fine and imprisonment, in like manner as every such person and juror might have been before the passing of the Act.

Where A. was fined by commissioners of sewers for refusing to be re-sworn upon a standing jury, the court of Exchequer discharged the fine; *ex parte* Taylor, 3 Y. & J. 91.

And see *ante*, 140, notes (44) and (45).

court of King's Bench : for in such case, as hath been said, it cannot be set right by attain. But there hath yet been no instance of granting a new trial, where the prisoner was *acquitted* upon the first (c) (43).

Conviction may be by confession or by verdict.

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If the jury, therefore, find the prisoner not guilty, he is then for ever quit and discharged of the accusation (d); except he be appealed of felony within the time limited by law (44). And upon such his acquittal, or discharge for want of *prosecution, he shall be immediately set at large, without payment of any fee to the gaoler (e). But if the jury find him guilty (f), he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country.

After conviction in cases of felony, the prosecutor and his witnesses are to be allowed their expenses, and the prosecutor may have restitution of his goods in cases of larceny.

When the offender is thus convicted, there are two collateral circumstances that immediately arise : 1. On a conviction, or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a *bonâ fide* prosecution, for any grand or petit larceny or other felony, the reasonable expences of prosecution, and also, if the prosecutor be poor, a compensation for his trouble and loss of time, are, by statutes 25 Geo. II. c. 36, and 18 Geo. III. c. 19, to be allowed him out of the county stock, if he petitions the judge for that purpose : and by statute 27 Geo. II. c. 3, explained by the same statute 18 Geo. III. c. 19, all persons appearing upon recog-

(c) 2 Hawk. P. C. 442.

(d) The civil law in such case only discharges him from the same accuser, but not from the same accusation. (Ff. 48, 2, 7, § 2.)

(e) Stat. 14 Geo. III. c. 20.

(f) In the Roman republic, when

the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something peculiarly delicate; not that he was guilty, but that he had not been enough upon his guard; "*parum cavisse videtur.*" (Festus, 325.)

(43) No new trial can be granted in cases of felony, or treason; *Rex v. Mawbey*, 6 T. R. 638; and see 13 East, 416, n. (b). But in cases of misdemeanor, it is entirely discretionary in the court whether they will grant or refuse a new trial; *id. ibid.* A new trial cannot, in general, be granted on the part of the prosecutor, after the defendant has been acquitted, even though the verdict appears to be

against evidence. But it seems to be the better opinion, that where the verdict was obtained by the fraud of the defendant, or in consequence of irregularity in his proceedings, as by keeping back the prosecutor's witnesses, or neglecting to give due notice of trial, a new trial may be granted; 1 Chit. Cr. L. 657.

(44) The appeal of felony is abolished by 59 Geo. III. c. 46.

nizance or *subpœna* to give evidence, whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a further allowance, if poor, for their trouble and loss of time (45). 2. On a conviction of larceny in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII. c. 11 (46). For by the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only: and, therefore, the party was enforced to bring an appeal of robbery, in order to have his goods again (*g*). But, it being considered that the party, prosecuting the offender by indictment, deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts that, if any person be convicted of larceny by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels; or the value of them out of the offender's goods, if he has any, by a writ to be granted by the

(*g*) 3 Inst. 242.

(45) These Acts are now all repealed, and new provisions on the same subject are made by 7 Geo. IV. c. 64, § 22 *et seq.*; which is set out, *ante* 295, *in notis*, and to which the reader is referred.

(46) Repealed by 7 & 8 Geo. IV. c. 27, and by 7 & 8 Geo. IV. c. 29, § 57, "to encourage the prosecution of offenders," it is enacted, that if any person guilty of any felony or misdemeanor under that Act, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by, or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof

in a summary manner: provided, that if it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security.

The proviso in this clause seems to be new, and the enacting part of it makes some very important alterations in the law, as the former Act of Parliament extended only to cases of prosecutions of thieves, and not receivers, and did not include property lost by false pretences, or by other misdemeanors.

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justices. And the construction of this Act having been in great measure conformable to the law of appeals, it has therefore in practice superseded the use of appeals in larceny. For instance : as formerly upon appeals (*h*), so now upon indictments of larceny, this writ of restitution *shall reach the goods so stolen, notwithstanding the property (*i*) of them is endeavoured to be altered by sale in market overt (*k*). And though this may seem somewhat hard upon the buyer, yet the rule of law is that “*spoliatus debet, ante omnia, restitui* ;” especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer ; the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. And it is now usual for the court, upon the conviction of a felon, to order, without any writ, immediate restitution of such goods, as are brought into court, to be made to the several prosecutors. Or else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them (*l*), unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods ; and recover a satisfaction in damages. But such action lies not before prosecution ; for so felonies would be made up and healed (*m*) : and also recaption is unlawful, if it be done with intention to smother or compound the larceny ; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter (*n*) (47).

In some cases of misdemeanor, the defendant is allowed to speak with the prosecutor.

It is not uncommon, when a person is convicted of a misdemeanor, which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to *speak with the prosecutor*, before any judgment is pronounced ; and, if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done, to reimburse the prosecutor his expences, and

(*h*) Bracton, de Coron. c. 32.

(*i*) See vol. II. page 450.

(*k*) 1 Hal. P. C. 543.

(*l*) See vol. III. page 4.

(*m*) 1 Hal. P. C. 546.

(*n*) See page 133.

(47) See *ante* 133, and notes.

make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice: *and, though it may be intrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter sessions; where prosecutions for assaults are by this means too frequently commenced, rather for private lucre than for the great ends of public justice. Above all it should never be suffered, where the testimony of the prosecutor himself is necessary to convict the defendant: for by this means, the rules of evidence are entirely subverted; the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay even a voluntary forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. "This," says an elegant writer (o), who pleads with equal strength for the *certainty* as for the *lenity* of punishment, "may be an act of goodnature and humanity, but it is contrary to the good of the public. For, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others."

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(o) Becc. ch. 46.

CHAPTER XXVIII.

OF THE BENEFIT OF CLERGY.

Benefit of
clergy,

AFTER trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance ; of which the principal is the *benefit of clergy* : a title of no small curiosity as well as use ; and concerning which I shall, therefore, inquire. 1. Into its original ; and the various mutations which this privilege of clergy has sustained. 2. To what persons it is to be allowed at this day. 3. In what cases. 4. The consequences of allowing it.

was at first
granted by the
crown to the
church as an
exemption,

I. Clergy, the *privilegium clericale*, or in common speech *the benefit of clergy*, had its original from the pious regard paid by christian princes to the church in its infant state ; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church, were principally of two kinds : 1. Exemption of *places*, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries : 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale*.

and afterwards
claimed by the
church as a
right.

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But the clergy, increasing in wealth, power, honour, number, and interest, began soon to set up for themselves : and that which they obtained by the favour of the civil government, they now claimed as their inherent right ; and as a *right of the highest nature, indefeasible, and *jure divino* (a). By their canons, therefore, and constitutions they endeavoured at, and where they met with easy princes obtained, a vast extension of these exemptions : as well in regard to the crimes themselves, of which the list became quite universal (b) ; as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer

(a) The principal argument, upon which they founded this exemption, was that text of scripture, "touch not mine

anointed, and do my prophets no harm." (Keilw. 181.)

(b) See vol. III. page 62.

belonging to the church or clergy, but even many that were totally laymen.

In England, however, although the usurpations of the pope were very many and grievous, till Henry the eighth entirely exterminated his supremacy, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy (*c*): and, therefore, though the ancient *privilegium clericale* was in some capital cases, yet it was not *universally* allowed. And, in those particular cases, the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts, as soon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty (*d*): till at length it was finally settled in the reign of Henry the sixth, that the prisoner should first be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, *after conviction*, by way of arresting judgment. This latter way is most usually practised, as it is more to the satisfaction of the court to have the crime previously ascertained by confession or the verdict of a jury; and also it is more advantageous to the prisoner himself, who may possibly be acquitted, and so need not the benefit of his clergy at all.

Originally the law was held, that no man should be admitted to the privilege of clergy, but such as had the **habitus et tonsuram clericalem* (*e*). But, in process of time, a much wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and, therefore, by statute 4 Hen. VII. c. 13, a distinction was once more drawn between mere lay scholars and clerks that were really in orders. And, though it was thought reasonable still to miti-

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(*c*) Keilw. 180.

(*d*) 2 Hal. P. C. 377.

(*e*) 2 Hal. P. C. 372; M. Paris,

A. D. 1259; see vol. I. page 24.

gate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs, that no person, once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders: and, in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. VIII. c. 1, and 32 Hen. VIII. c. 3, but is held (*e*) to have been virtually restored by statute 1 Edw. VI. c. 12, which statute also enacts that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence, (although they cannot read, and without being burnt in the hand,) for all offences then clergyable to commoners, and also for the crimes of housebreaking, highway-robbery, horse-stealing, and robbing of churches (1).

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*After this burning the laity, and before it the real clergy, were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation

(*e*) Hob. 294; 2 Hal. P. C. 375.

(1) Upon the conviction of the duchess of Kingston for bigamy, it was argued by the attorney general Thurlow, that peeresses were not entitled by 1 Edw. VI. c. 12, like peers, to the privilege of peerage; but it was the unanimous opinion of the judges, that a peeress, convicted of a clergyable felony, ought to be immediately discharged without being burnt in the hand, or without being liable to any imprisonment; 11 How. St. Tr. 264. If the duchess had been admitted, like a commoner, only to the benefit of clergy, burning in the hand at that time could not have been dispensed with.

The argument was, that the privi-

lege of peerage was only an extension of the benefit of clergy, and therefore granted only to those who were or might be entitled to that benefit; but as no female, peeress, or commoner, at that time, was entitled to the benefit of clergy, so it was not the intention of the legislature to grant to any female the privilege of peerage.

And, in my opinion, the argument of the attorney general is much more convincing and satisfactory, as a legal demonstration, than the arguments of the counsel on the other side, or the reasons stated for the opinions of the judges.—
CH.

of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession (*f*). This trial was held before the bishop in person, or his deputy: and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only; and lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner: otherwise, if a clerk, he was degraded, or put to penance (*g*). A learned judge, in the beginning of the last century (*h*), remarks with much indignation the vast complication of perjury and subornation of perjury, in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted and almost compelled to swear himself not guilty; nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man.

This scandalous prostitution of oaths, and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion that, upon very heinous and *no-
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 [10169] torious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione faciendâ*: in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As, therefore, these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law;

(*f*) Staundford, P. C. 138, *b*.

(*h*) Hob. 291.

(*g*) 3 P. Wms. 447; Hob. 289.

it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony.

Accordingly, the statute 18 Eliz. c. 7, enacts that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso, that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued, for above a century, unaltered; except only that the statute 21 Jac. I. c. 6, allowed, that women convicted of simple larcenies under the value of ten shillings should (not properly have the benefit of clergy, for they are not called upon to read, but) be burned in the hand, and whipped, stocked, or imprisoned, for any time not exceeding a year. And a similar indulgence, by the statutes 3 and 4 W. and M. c. 9, and 4 and 5 W. and M. c. 24, was extended to women, guilty of any clergyable felony whatsoever; who were allowed once to claim the benefit of the *statute*, in like manner as men might claim the benefit of *clergy*, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the *hand* being found ineffectual, was also changed by statute 10 and 11 W. III. c. 23, into burning in the most visible part of the left *cheek*, nearest the nose: but, such an indelible stigma being found by experience to render offenders desperate, this provision was repealed about seven years afterwards, by statute 5 Ann. c. 6, and, till that period, all women, all peers of parliament and peeresses, and all male commoners who could read, were discharged *in all clergyable felonies; the males absolutely, if clerks in orders; and other commoners, both male and female, upon branding, and peers and peeresses without branding, for the first offence: yet all liable, excepting peers and peeresses, if the judge saw occasion, to imprisonment not exceeding a year. And those men, who could not read, if under the degree of peerage, were hanged.

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Afterwards, indeed, it was considered, that education and learning were no extenuations of guilt, but quite the reverse: and that, if the punishment of death for simple felony was too severe for those who had been liberally instructed, it was, *a fortiori*,^{*} too severe for the ignorant also. And thereupon,

by the same statute, 5 Ann. c. 6, is was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit. And experience having shewn, that so very universal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital punishments were too rigorous for these inferior punishments, yet no punishment at all, or next to none, was as much too gentle: it was further enacted by the same statute, that when any person is convicted of any theft or larceny, and burnt in the hand for the same according to the ancient law, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labour, for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And it was also enacted by the statutes 4 Geo. I. c. 11, and 6 Geo. I. c. 23, that when any persons shall be convicted of any larceny, either grand or petit, or any felonious stealing or taking of money, or goods and chattels, either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America (or, by statute 19 Geo. III. c. 74, to any other parts beyond the seas) for seven years: and, if they *return, or are seen at large in this kingdom within that time, it shall be felony without benefit of clergy. And by the subsequent statutes, 16 Geo. II. c. 15, and 8 Geo. III. c. 15, many wise provisions are made for the more speedy and effectual execution of the laws relating to transportation, and the conviction of such as transgress them (2). But now, by the statute 19 Geo. III. c. 74, all offen-

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(2) See the existing law upon this subject partially detailed, *ante*, 132, notes (12) and (13). The 5 Geo. IV. c. 84, § 1, recites, that the laws then in force for regulating the transportation of offenders would expire at the end of that session, and enacts that all persons already ordered for transporta-

tion shall be placed under the provisions of that Act, which are in substance similar to those in the preceding statutes. It has been held with reference to one of the former Acts, 8 Geo. III. c. 15, that the word *transportation* meant not merely the conveying the felon to the place of trans-

ders liable to transportation may, in lieu thereof, at the discretion of the judges, be employed, if males, except in the case of petit larceny, in hard labour for the benefit of some public navigation : or, whether males or females, may, in all cases, be confined to hard labour in certain penitentiary houses, to be erected by virtue of the said Act, for the several terms therein specified, but in no case exceeding seven years ; with a power of subsequent mitigation, and even of reward, in case of their good behaviour. But, if they escape, and are retaken, for the first time an addition of three years is made to the term of their confinement ; and a second escape is felony without benefit of clergy.

In forming the plan of these penitentiary houses, the principal objects have been, by sobriety, cleanliness, and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction, to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection, and to teach them both the principles and practice of every christian and moral duty. And, if the whole of this plan be properly executed, and its defects be timely supplied, there is reason to hope that such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may, in time, supersede the necessity of capital punishment, except for very atrocious crimes.

It is also enacted by the same statute, 19 Geo. III. c. 74, that, instead of burning in the hand, which was sometimes too slight and sometimes too disgraceful a punishment, the court, in all clergyable felonies, may impose a pecuniary fine ; or, except in the case of manslaughter, may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped ; such private whipping, to prevent collusion or abuse, to be inflicted in the presence of two witnesses ; and in case of female offenders, in the

portation, but his being so conveyed and remaining there during the term for which he was ordered to be transported ; and, therefore, that a felon attainted was not, by that statute, re-

stored to his civil rights till after the expiration of the term for which he was ordered to be so transported ; *Bullock v. Dodds*, 2 B. & A. 258.

presence of females only. Which fine or whipping shall have the same consequences as burning in the hand; and the offender, so fined or whipped, shall be equally liable to a subsequent detainer or imprisonment (3).

In this state does the benefit of clergy at present stand; very considerably different from its original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted, by a noble alchemy, rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

From the whole of this detail we may collect that, however in times of ignorance and superstition that monster in true policy may for awhile subsist, of a body of men, residing in the bowels of a state, and yet independent of its laws; yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross as must destroy its very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land: and that united force is exerted in their due, and universal, execution.

II. I am next to inquire, to what *persons* the benefit of clergy is to be allowed at this day: and this must be chiefly collected from what has been observed in the preceding *article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of course without any transportation, fine, or whipping, (for those are only substituted in lieu of the other,) to be admitted to this privilege, and immediately discharged; and this as often as they offend (*i*). Again, all lords of parliament and peers of the realm having place and voice in parliament, by the statute 1 Edw. VI. c. 12, which is likewise held to extend to peeresses (*k*), shall be discharged in all clergyable and other

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(i) 2 Hal. P. C. 375.

(k) *Duchess of Kingston's case*, in parliament, 22 Apr. 1776.

(3) The 19 Geo. III. c. 74, was made perpetual by the 39 Geo. III. c. 45; but by the 1 Geo. IV. c. 57, the punishment of whipping *females* is abolished.

felonies, provided for by the act, without any burning in the hand, or imprisonment, or other punishment substituted in its stead, in the same manner as real clerks convict: but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male or female, shall, for the first offence, be discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment in the common gaol, the house of correction, one of the penitentiary houses, or in the places of labour for the benefit of some navigation; or, in cases of larceny, upon being transported for seven years, if the court shall think proper. It hath been said, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6, as being under a legal incapacity for orders (*l*). But I much question whether this was ever ruled for law, since the reintroduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were, before the act, entitled to the benefit of their clergy.

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III. The third point to be considered is, for what *crimes* the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason, nor in petit larceny, nor in any mere misdemeanors, it was indulged at the common law; and, therefore, we may lay it down for a rule, that it was allowable only in petit treason and capital felonies: which, for the most part, became legally entitled to this *indulgence by the statute *de clero*, 25 Edw. III. stat. 3, c. 4, which provides that clerks convict for treason or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz. *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country (*m*); and *combustio domorum*, or arson, that is, the burning of houses (*n*),

(*l*) 2 Hal. P. C. 373; 2 Hawk. P. C. 33; 8 Fost. 306.

(*m*) 2 Hal. P. C. 333.

(*n*) 1 Hal. P. C. 346.

all which are a kind of hostile acts, and, in some degree, border upon treason. And further, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have, in general, been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Upon all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law to the same rigour of capital punishment in the first offence, that is exerted before the *privilegium clericale* was at all indulged; and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clerks actually in orders. But so tender is the law of inflicting capital punishment in the first instance for any inferior felony, that, notwithstanding, by the marine law, as declared in statute 28 Hen. VIII. c. 15, the benefit of clergy is not allowed in any case whatsoever; yet, when offences are committed within the admiralty jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner (*o*). And, to conclude this head of inquiry, we may observe the following rules: I. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament (*p*). 2. That, where clergy is taken away from the principal, it is not, of course, taken away from the accessory, unless he be also particularly included in the words of the statute (*q*). 3. That, when the benefit of clergy is taken away from the *offence*, (as in case of murder, sodomy, robbery, rape, and burglary,) a principal in the second degree, being present, aiding and abetting the crime, is as well *excluded from his clergy as he that is principal in the first degree: but, 4. That, where it is only taken away from the *person committing* the offence, as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person, his aiders and abettors are not excluded; through the tenderness of the law, which hath determined that such statutes shall be taken literally (*r*).

IV. Lastly, we are to inquire what the consequences are to the party, of allowing him this benefit of clergy. I speak

(*o*) Moor, 756; Fost. 288.

(*p*) 2 Hal. P. C. 330.

(*q*) 2 Hawk. P. C. 341.

(*r*) 1 Hal. P. C. 529; Foster, 356, 357.

not of the branding, fine, whipping, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as effect his present interest, and future credit and capacity; as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon (4).

And, we may observe, 1. That by this conviction he forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender (*s*). 2. That, after conviction, and till he receives the judgment of the law, by branding or some of its substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon (*t*). 3. That, after burning or its substitute, or pardon, he is discharged for ever of that and all other felonies before committed, within the benefit of clergy; but not of felonies from which such benefit is excluded: and this by statutes 8 Eliz. c. 4, and 18 Eliz. c. 7. 4. That by the burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted (*u*). 5. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. For they have the same privileges, without any burning, or any substitute for it, which others are entitled to after it (*v*) (5).

(*s*) 2 Hal. P. C. 388.

(*u*) 2 Hal. P. C. 389; 5 Rep. 110.

(*t*) 3 P. Wms. 487.

(*v*) 2 Hal. P. C. 389, 390.

(4) See the present law as to pardon, *post*, 398, *et seq.*

(5) The various statutes mentioned in the course of this chapter, as relating to benefit of clergy, have been either expressly repealed or rendered inoperative, by the passing of the recent statute, 7 & 8 Geo. IV. c. 28; sect. 6 of which enacts, that benefit of clergy with respect to persons convicted of felony shall be abolished; but that nothing therein contained shall prevent

the joinder in any indictment of any counts which might have been joined before the passing of the Act.

Sect. 7 of the same statute enacts, that no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy before, or on the first day of the (then) present session of parliament, or which has been or shall be made punishable with death by some statute passed after that day.

The 6 Geo. IV. c. 25, intituled, "An Act for defining the rights of capital convicts who receive pardon, and of convicts after having been punished for clergyable felonies; for placing clerks in orders on the same footing with other persons, as to felonies; and for limiting the effect of the benefit of clergy;" had previously enacted, by sect. 1, that in case of free pardons, the prisoner's discharge, and in case of conditional pardons, the performance of the condition, should have the effect of a pardon under the great seal; by sect. 2, that offenders convicted of cler-

gyable felonies enduring the punishment adjudged, such punishment should have the effect of burning in the hand; by sect. 3, that clerks should be liable to punishment as if not in orders; and by sect. 4, that the allowance of the benefit of clergy to any person who should, after the passing of that Act, be convicted of any felony, should not render the person to whom such benefit was allowed, dispunishable for any other felony by him or her committed before the time of such allowance, any law, custom, or usage, to the contrary, notwithstanding.

CHAPTER XXIX.

OF JUDGMENT AND ITS CONSEQUENCES.

Judgment follows upon conviction, unless some motion is made in arrest thereof.

WE are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors as are either too high or too low to be included within the benefit of clergy: which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has any thing to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor, (the trial of which may, and does usually, happen in his absence, after he has once appeared,) a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of judgment: as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again (a). And we may take notice, 1. That none of the statutes of *jeofails* (b), for amendment of errors, extend to indictments or proceedings in *criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favour of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale, indeed, complains, “that this strictness is grown to be a blemish and inconvenience in the law, and the administration thereof; for that more offenders escape by the overeasy ear given to exceptions in indictments, than by their own innocence (c).”

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(a) 4 Rep. 45

(b) See vol. III. page 407.

(c) 2 Hal. P. C. 193.

And yet no man was more tender of life than this truly excellent judge (1).

A pardon, also, as has been before said, may be pleaded in arrest of judgment: and it has the same advantage when pleaded here, as when pleaded upon arraignment; *viz.* the saving the attainder, and, of course, the corruption of blood: which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And, certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible (2).

Pardon may be pleaded in arrest of judgment, and saves attainder.

Praying the benefit of clergy may also be ranked among the motions in arrest of judgment: of which we spoke largely in the preceding chapter.

If all these resources fail, the court must pronounce that judgment, which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters (3). Of

When judgment is not arrested, sentence must be passed.

(1) The law upon this subject has been materially altered by the statute 7 Geo. IV. c. 64, § 20, which see, set out, *ante*, 306, note (8), and by sect. 21 of the same statute, which enacts, that no judgment after verdict upon any indictment or information for any felony or misdemeanor, shall be stayed, or reversed, for want of a similiter; nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion; nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors; nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute. As to amendments of indictments, &c. vide *ante*, 306, note (7), 307, note (11).

(2) Formerly a pardon could not be pleaded, unless it were by Act of Parliament, or under the great seal; and the king's warrant under the sign manual was not pleadable, as now; *Rex v. Beaton*, 1 Bl. R. 479; Car. Cr. L. 104; see further on this subject, *post*, 398, *et seq.*

(3) By 4 Geo. IV. c. 48, § 1, in cases of convictions of capital felonies, except murder, the court may abstain from pronouncing judgment of death, and may order it to be entered of record. Vide *ante*, 19, note (16). A man, upon whom sentence of death has passed, ought not, while under that sentence, to be brought up to receive judgment for another felony; although he was under that sentence when he was tried for the other felony, and did not plead his prior attainder. Anonymous case, R. & R. C. C. 268. On an indictment against two, for a joint offence, if they are found guilty separately, upon a pardon or *nolle prosequi* as to the one who stands second upon the verdict, judgment may be given against the other; *Rex v. Hempstead*, *id.* 344. Formerly in cases of indict-

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these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace, are superadded: as, in treasons *of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive, beheading, and quartering (4), and, in murder, a public dissection (5). And, in case of any treason committed by a female, the judgment is to be burned alive (6). But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savours of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence,) of any persons being embowelled or burned, till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a disability of holding offices or employments; being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears: others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek. Some are merely pecuniary, by stated or discretionary fines: and, lastly, there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for such crimes, as either arise from indigence, or render even opulence disgraceful. Such as whipping, hard labour in the house of correction, or otherwise, the pillory, the stocks, and the ducking-stool (7).

ments for felonies or misdemeanors removed into the court of King's Bench by certiorari and tried at the assizes, the judges, before whom such trials were, had no power of pronouncing judgment upon the parties convicted before them, that power being confined to the court when sitting in banc at Westminster. This evil, for such it had

long been felt to be, was remedied by statute 1 W. 4, c. 70, § 9, which see set out *ante*, 265 n. (9)

(4) Vide *ante*, 93, notes (20), (21).

(5) Vide *ante*, 202, note (55.)

(6) Vide *ante*, 93, note (21), 204, note (56).

(7) The law upon this subject has recently undergone various alterations,

Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honour to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe. And it is moreover one of the glories of our English law, that the species, though not always the quantity or degree, of punishment, is *ascertained* for every offence; and that it is not left in the breast of any *judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And, besides, as this prevents oppression on the one hand, so, on the other, it stifles all hopes of impunity or mitigation; with which an offender might flatter himself, if his punishment depended on the humour or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions. [*378]

which have been noticed in various places, *ante*; and the present punishment for each individual offence has been also described in the notes to such part of the text as treated of such offence: see the different titles in the index to the notes. The new statutes, in many instances, *expressly* authorize the infliction of two kinds of punishment, as imprisonment *and* hard labour, &c. This was necessary; for, under the 22 Geo. III. c. 58 (now repealed), which directed the punishment to be fine, imprisonment, or whipping, it was held that no two of those kinds of punishment could be inflicted; *Rex v. Howell*, R. & R. C. C. 253. The misinterpretation of the new statutes has also been further guarded against by the 14th section of the 7 & 8 Geo. IV. c. 28, which enacts, that wherever that, or any other statute, relating to any offence, whether punishable upon indictment

or summary conviction, in describing or referring to the offence, or the subject matter on or with respect to which it shall be committed, or the offender, or the party affected or intended to be affected by the offence, hath used, or shall use, words importing the singular number, or the masculine gender, only, yet the statute shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and wherever any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate, in every case where such body shall be the party aggrieved.

The discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, *viz.* by fine or imprisonment, is, in these cases, fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, in particular, of pecuniary fines, neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every person that struck another, five and twenty *denarii*: this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomsoever he pleased, and then tender them the legal forfeiture. Our statute law has not, therefore, often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine in general, without specifying the certain sum: which is fully sufficient, when we consider, that *however unlimited the power of the court may seem, it is as far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights (*d*) has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted; (which had a retrospect to some unprecedented proceedings in the court of King's Bench, in the reign of king James the second:) and the same statute further declares, that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void.* Now the bill of rights was only declaratory of the old constitutional law: and accordingly we find it expressly holden, long before (*e*), that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.

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The reasonableness of fines in criminal cases has also been usually regulated by the determination of *Magna Charta*,

(*d*) Stat. 1 W. & M. st. 2, c. 2.

(*e*) 2 Inst. 48.

c. 14, concerning amercements for misbehaviour by the suitors in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto secundum magnitudinem delicti; salvo contenemento suo; et mercator eodem modo, salva mercandis sua; et villanus eodem modo, amercietur, salvo wainagio suo* (8)." A rule, that obtained even in Henry the second's time (f), and means only, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear; saving to the landholder his contenment (9), or land; to the trader his merchandise; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms, "*sit in misericordia*," shall be set, *ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a precise sum, was usually performed in the superior courts by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the statute Westm. 1, c. 18; and then the judges estreated them into the exchequer (g). But in the court-leet and court-baron it is still performed by **affeerors*, or suitors sworn to *affeere*, that is, tax and moderate the *general* amercement according to the *particular* circumstances of the offence and the offender (h). Amercements imposed by the superior courts on their own officers and ministers were affeered by the judges themselves; but when a pecuniary mulct was inflicted by them on a stranger, not being party to any suit, it was then

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(f) Glanv. l. 9, c. 8, and 11.

in the very terms of *Magna Charta*;

(g) F. N. B. 76.

Fitzh. Survey, ch. 11.

(h) The affeelor's oath is conceived

(8) A freeman shall not be amerced for a small offence except according to the measure of his offence, and for a great offence, according to the magnitude of his offence, saving to him his contenment, and the merchant in the same way, saving to him his merchandise, and the countryman in the same way, saving to him his wainage.

(9) Lord Coke says, that "conte-

nement signifieth his countenance, as the armour of a soldier is his countenance, the books of a scholar his countenance, and the like;" 2 Inst. 28. He also adds, that "the *wainagium* is the countenance of the villain, and it was great reason to save his wainage, for otherwise the miserable creature was to carry the burden on his back;" Ibid.

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denominated a *fine* (i); and the ancient practice was, when any such fine was imposed to inquire by a jury "*quantum inde regi dare valeat per annum, salvâ sustentatione suâ, et uxoris, et liberorum suorum* (j) (10)." And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such fine as might amount to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms, because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine (k): according to an ancient maxim, *qui non habet in crumena luat in corpore* (11). Yet, where any statute speaks both of fine and ransom, it is holden, that the ransom shall be treble to the fine at least (l).

Attainder is the immediate consequence of judgment of death, or of outlawry for a capital offence.

When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence from the common law is *attainder*. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no further care of him than barely to see him executed (12). He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law (m). This is after *judgment*: for there is great difference between a man *convicted* and *attainted*; though they are frequently through inaccuracy confounded together. After conviction *only, a man is liable to none of these disabilities: for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest

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(i) 8 Rep. 40.

(j) Gilb. Exch. c. 5.

(k) Mirr. c. 5, § 3; Lamb. Eire-

narch, 575.

(l) Dyer, 232.

(m) 3 Inst. 213.

(10) How much he can afford to give to the king by the year, saving to him, sustenance for himself, his wife, and his children.

(11) He who has nothing in his

purse, must pay in his person.

(12) But his person is still so far under the protection of the law, that to kill him without a warrant would be murder; Fost. 73.

of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of any thing to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And, therefore, either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.

The consequences of attainder are forfeiture and corruption of blood.

The consequences of attainder are,

I. Forfeiture is twofold; of real, and personal estates. First, as to real estates: by attainder in high treason (*n*) a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be forever vested in the crown: and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed: so as to avoid all intermediate sales and incumbrances (*o*), but not those before the fact: and, therefore, a wife's jointure is not forfeitable for the treason of her husband; because settled upon her previous to the treason committed. But her dower *is forfeited by the express provision of statute 5 and 6 Edw. VI. c. 11. And yet the husband shall be tenant by the courtesy of the wife's lands, if the wife be attainted of treason (*p*): for that is not prohibited by the statute. But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits: and therefore, if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works

Forfeiture of real and personal estates:

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(*n*) Co. Litt. 392; 3 Inst. 19; 1 Hal. P. C. 240; 2 Hawk. P. C. 448.

(*o*) 3 Inst. 211.

(*p*) 1 Hal. P. C. 359.

no forfeiture of his lands : for he never was attainted of treason (*q*). But if the chief justice of the King's Bench, the supreme coroner of all England, in person, upon the view of the body of one killed in open rebellion, records it and returns the record into his own court, both lands and goods shall be forfeited (*r*).

The natural justice of forfeiture or confiscation of property, for treason (*s*), is founded in this consideration : that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connexions with society ; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community, among which *social* advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures, moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections ; and will interest every dependent and relation he has, to keep him from offending ; according to that beautiful sentiment of Cicero (*t*), "*nec vero me fugit quam sit acerbum, parentum scelera filiorum pœnis lui : sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet* (13)." And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for *despising the power of the tyrants ; his old age, and his want of children : for children are pledges to the prince of the father's obedience (*t*). Yet many nations have thought, that this posthumous punishment savours of hardship to the innocent ; especially for crimes that do not strike at the very root and foundation of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet

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(*q*) Co. Litt. 13.

(*r*) 4 Rep. 57.

(*s*) See vol. I. page 259.

(*t*) Ad Brutum, ep. 12.

(*t*) Gravin. 1, § 68.

(13) Nor does it escape me how severe is the law, that the sins of the parents shall be expiated by the punishment of the children : but the law was

enacted for this admirable purpose, that affection for their children might render parents more careful of the interests of the commonwealth.

Arcadius and Honorius in every other instance but that of treason thought it more just, *ibi esse pœnam, ubi et noxa est;*” and ordered that “*peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperitur delictum* (v) (14):” and Justinian also made a law to restrain the punishment of relations (u); which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand the Macedonian laws extended even the capital punishment of treason, not only to the children but to all the relations of the delinquent (w): and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle (x), copied almost *verbatim* from Justinian’s code (y), the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor’s *particular bounty*. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honour, ecclesiastical or civil: “to the end that, being always poor and necessitous, they may for ever be accompanied by the infamy of their father: may languish in continual indigence; and may find, says this merciless edict, their punishment in living, and their relief in dying.”

With us in England, forfeiture of lands and tenements to the crown for treason is by no means derived from the feudal policy, as has been already observed (z), but was antecedent to the establishment of that system in this island; *being transmitted from our Saxon ancestors (a), and forming a part of the ancient Scandinavian constitution (b). But in certain treasons relating to the coin, which, as we formerly observed, seem rather a species of the *crimen falsi*, than the *crimen læsæ majestatis*, it is provided by some of the modern statutes (c) which constitute the offence, that it shall work no

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(v) Cod. 9, 47, 22.

(u) Nov. 134, c. 13.

(w) Qu. Curt. l. 6.

(x) Cap. 24.

(y) L. 9, t. 8, l. 5.

(z) See vol. II. page 251.

(a) LL. Ælfr. c. 4; Canut. c. 54.

(b) Stiernh. de jure Goth. l. 2, c. 6, and l. 3, c. 3.

(c) Stat. 5 Eliz. c. 11; 18 Eliz. c. 1.

(14) That the punishment should fall where the crime was committed: that crimes should affect their immediate perpetrators: and that the fear of

punishment should not extend beyond the person detected in the commission of an offence.

forfeiture of lands, save only for the life of the offender ; and by all, that it shall not deprive the wife of her dower (*d*). And, in order to abolish such hereditary punishment entirely, it was enacted by statute 7 Ann. c. 21, that after the decease of the late pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person, other than the traitor himself. By which, the law of forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration. The history of this matter is somewhat singular and worthy observation. At the time of the union, the crime of treason in Scotland was, by the Scots law, in many respects different from that of treason in England ; and particularly in its consequence of forfeitures of entailed estates, which was more peculiarly English ; yet it seemed necessary that a crime so nearly affecting government should, both in its essence and consequences, be put upon the same footing in both parts of the united kingdoms. In new-modelling these laws, the Scotch nation and the English House of Commons struggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood ; which the House of Lords as firmly resisted. At length a compromise was agreed to, which is established by this statute, *viz.* that the same crimes, and no other, should be treason in Scotland that are so in England ; and that the English forfeitures and corruption of blood should take place in Scotland, till the death of the then pretender ; and then cease throughout the whole of Great Britain (*e*) : the lords artfully proposing this temporary clause, in **hopes*, it is said (*f*), that the prudence of succeeding parliaments would make it perpetual (*g*). This has partly been done by the statute 17 Geo. II. c. 39, made in the year preceding the late rebellion, the operation of these indemnifying clauses being thereby still further suspended, till the death of the sons of the pretender (*h*) (15).

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(*d*) Ibid. 8 & 9 W. III. c. 26 ; 15 & 16 Geo. II. c. 28.

(*e*) Burnet's Hist. A. D. 1709.

(*f*) Considerations on the Law of Forfeiture, 6.

(*g*) See Fost. 250.

(*h*) The justice and expediency of this provision were defended at the time, with much learning and strength of argument, in the *Considerations on the Law of Forfeiture*, first published A. D. 1744. (See vol. I. page 244.)

(15) The particular clauses in the 7 Ann. c. 21, and 17 Geo. II. c. 39.

In petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life: and, after his death, all his lands and tenements in fee simple, but not those in tail, to the crown, for a very short period of time: for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's *year, day, and waste* (i). Formerly the king had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a punishment of a similar spirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel (k) and Ezra (l); which, besides the pain of death inflicted on the delinquents there specified, ordain, "that their houses shall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the first, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit (m): and therefore *Magna Charta* (n) provides, that the king shall only hold such lands for a year and a day, and then restore them to the lord of the fee; without any mention made of waste. But the statute 17 Edw. II. *de prerogativa regis* seems to suppose, that the king shall have his *year, day, and waste: and not the year

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(i) 2 Inst. 37.

(k) Ch. III. 29.

(l) Ch. vi. 11.

(m) Mirr. c. 4, § 16; Flet. 1. 1, c. 28.

(n) 9 Hen. III. c. 22.

limiting the time when forfeiture for treason should be removed, were repealed by 39 Geo. III. c. 93, which left the law of forfeiture nearly on the same footing on which it stood at common law; and by the 54 Geo. III. c. 145, intituled, An Act to take away corruption of blood in certain cases, it is enacted, "that no attainder for felony, which shall take place after the passing of that Act, except in cases of high treason, petit treason (now abolished), or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir,

nor to the prejudice of the right or title of any person, other than the right or title of the offender during his life only: and that it shall be lawful to every person to whom the right or interest of any lands, tenements, or hereditaments, after the death of such offender, should or might have appertained if no such attainder had been, to enter into the same." So that all forfeiture of lands is now abolished, except during the life of the party, and corruption of blood in every instance, except those of treason and murder.

and day *instead of* waste. Which Sir Edward Coke, and the author of the Mirror before him, very justly look upon as an encroachment, though a very ancient one, of the royal prerogative (o). This year, day, and waste are now usually compounded for; but otherwise they regularly belong to the crown; and, after their expiration, the land would naturally have descended to the heir, as in gavel-kind tenure it still does, did not its feudal quality intercept such descent, and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a *felo de se* forfeits no lands of inheritance or freehold, for he never is attainted as a felon (p) (16). They likewise relate back to the time of the offence committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender; but the cruelty and reproach must lie on the part, not of the law, but of the criminal; who has thus knowingly and dishonestly involved others in his own calamities (17).

(o) *Mirr. c. 5, § 2; 2 Inst. 37.*

(p) *3 Inst. 55.*

(16) But he forfeits all his chattels, and that from the time of the act done; vide *ante* 190, note (22).

(17) The forfeiture of *copyhold* lands is to the lord, not to the king; 1 *Watkins*, 341; *Kean v. Kerby*, 1 *Mod.* 200; *Margaret Podger's case*, 9 *Co. Rep.* 107: and relates back to the time when the offence was committed; *Co. Litt.* 390, b.; *Com. Dig. Forfeiture* (B. 6). But, after the forfeiture, it is necessary that some act shall be done by the lord, by office found, or presentment made, or entry and seizure, or by some step or other, before the estate will vest in him. Therefore, where a copyholder, joint tenant, was capitally convicted of felony, and pardoned upon condition of suffering two years' imprisonment, and the lord took no steps towards seizing the land, and after the two years' imprisonment had expired, the copyholder brought ejectment against his joint tenant, who had ousted him, it was held that the lord having

taken no step towards seizing the land, it did not vest in him, and that the copyholder, being restored to his civil rights by the pardon, might maintain the action; *Doe v. Evans*, 8 *D. & R.* 309; 5 *B. & C.* 584. There cannot be a forfeiture of copyhold by a conviction of felony before attainder, unless there be a special custom in the manor to the contrary; *Rex v. Wiltes*, 3 *B. & A.* 510. Where there is a remainder to the use of one who is convicted of felony, and hanged before admittance, the lands are not forfeited to the lord, but descend to the heir of the surrenderor; *Rex v. Hicks*, 2 *Wils.* 13. Upon a felony committed by surrenderor before admittance of surrenderee, the copyhold escheats to the lord; *Rex v. Lady of Manor of Marwell*, 2 *Nev. & Man.* 778. Although the surrender be by way of mortgage; *Id. Ibid.* But a freehold interest is not divested out of an attainted felon until office found; *Doe v. Pritchard*, *Id.* 489.

These are all the forfeitures of real estates, created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes of *præmunire* and others: because I look upon them rather as a *part* of the judgment and penalty, inflicted by the respective statutes, than as *consequences* of such judgment; as in treason and felony they are. But I shall just mention, as a part of the forfeiture of real estates, the forfeiture of the profits of lands during life: which extends to two other instances, besides those already spoken of, misprision of treason (*q*), and striking in Westminster Hall, or drawing a weapon upon a judge there, sitting in the king's courts of justice (*r*).

The forfeiture of goods and chattels accrues in every one of the higher kinds of offence: in high treason or misprision *thereof, petit treason, felonies of all sorts whether clergyable or not, self-murder or felony *de se*, petit larceny, standing mute, and the above-mentioned offences of striking, &c. in Westminster Hall. For *flight* also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall forfeit his goods and chattels: for the very flight is an offence, carrying with it a strong presumption of guilt, and is at least an endeavour to elude and stifle the course of justice prescribed by the law. But the jury very seldom find the flight (*s*): forfeiture being looked upon, since the vast increase of personal property of late years, as too large a penalty for an offence, to which a man is prompted by the natural love of liberty (18).

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There is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels

(*q*) 3 Inst. 218.(*s*) Staundf. P. C. 183, b.(*r*) Ibid. 141.

And under a demise by the felon after attainder, the lessee has a good title against all but the king and the lord of whom the land is held; Id. Ibid. Such attainted felon, therefore, is a good lessor in ejectment; Id. Ibid.

(18) By 7 & 8 G. IV. c. 28, § 5, it is enacted, "that where any person

shall be indicted for treason or felony, the jury empannelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony." The practice had been wholly discontinued for some years prior to the passing of the statute.

are forfeited by *conviction*. Because in many of the cases where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in those cases the forfeiture must be upon conviction, or not at all; and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being first put in the *exigent*, without staying till he is *quinto exactus*, or finally outlawed; for the secreting himself so long from justice, is construed a flight in law (*s*) (19). 3. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances: but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bonâ fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction (*t*): for personal property is of *so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not *bonâ fide* parted with, merely to defraud the crown, the law, and particularly the statute 13 Eliz. c. 5, will reach them; for they are all the while truly and substantially the goods of the offender: and as he, if acquitted, might recover them himself, as not parted with for a good consideration; so in case he happens to be convicted, the law will recover them for the king.

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And corruption
of blood.

II. Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they

(*s*) 3 Inst. 232.(*t*) 2 Hawk. P. C. 454.(19) As to forfeiture by outlawry, vide *ante*, 319, notes (4) and (5).

are obliged to derive a title through him to a remoter ancestor (*u*) (20).

This is one of those notions which our laws have adopted from the feudal constitutions, at the time of the Norman conquest; as appears from its being unknown in those tenures which are indisputably Saxon, or gavel-kind: wherein, though by treason, according to the ancient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descents, ensues; and, on judgment of mere felony, no escheat accrues to the lord. And therefore, as every other oppressive mark of feudal tenure is now happily worn away in these kingdoms, it is to be hoped, that this *corruption of blood*, with all its connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by Act of Parliament: as it stands upon a very different footing from the forfeiture of lands for high *treason, affecting the king's person or government. And indeed the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting, that, in certain treasons respecting the papal supremacy (*w*) and the public coin (*x*), and in many of the new-made felonies, created since the reign of Henry the eighth by act of Parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies, and those not of the most atrocious kind, this saving was neglected, or forgotten, to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law: especially as by the aforementioned statute of 7 Ann. c. 21, the operation of which is postponed by statute 17 Geo. II. c. 39, after the death of the sons of the late pretender, no attainder for treason will extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all corruption of blood for treason, though, unless the legislature should interpose, it will still continue for many sorts of felony (21).

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(*u*) See vol. II, page 251.

(*w*) Stat. 5 Eliz. c. 1.

(*x*) Stat. 5 Eliz. c. 11; 18 Eliz.

c. 1; 8 & 9 W. III. c. 26; 15 & 16
Geo. II. c. 28.

(20) Vide *ante* 385, note (15).

(21) Vide *ante* 385, note (15).

CHAPTER XXX.

OF REVERSAL OF JUDGMENT.

Judgment may be set aside by reversing the attainder; or, by reprieve, or pardon.

Attainder may be reversed without a writ of error, for matter *dehors* the record,

WE are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A judgment may be falsified, reversed, or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby, in both civil and criminal cases, may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter, without writ of error. As, where a commission issues to A. and B., and twelve others, or any two of them, of which A. or B. shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence *of either A., or B.: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error (*a*); it being a high misdemeanor in the judges so proceeding, and little, if any thing, short of murder in them all, in case the person so attainted be executed and suffer death. So likewise if a man purchases land of another; and afterwards the vendor is, either by outlawry, or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby such land becomes liable to forfeiture or escheat: now, upon any trial, the pur-

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(*a*) 2 Hawk. P. C. 459.

chaser is at liberty, without bringing any writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself: and is not concluded by the confession or the outlawry of the vendor; though the vendor himself is concluded, and not suffered now to deny the fact, which he has by confession or flight acknowledged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falsify or contradict the *fact* of the crime committed; though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before (b).

Secondly, a judgment may be reversed, *by writ of error*: by writ of error, for mistakes in the judgment, or record; which lies from all inferior criminal jurisdictions to the court of King's Bench and from the King's Bench to the house of Peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors (1); such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper *addition* to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other officer of the court, or not duly describing where his county-court was held; for laying an offence, committed in the time of the late king, to be done *against the peace of the present; and for many other similar causes, which, though allowed out of

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(b) 3 Inst. 231; 1 Hal. P. C. 361.

(1) Where a prisoner was convicted of perjury in an inferior jurisdiction, and sentence of transportation was thus entered: "wherefore all and singular the said premises being seen, &c., it is ordered that the said A. B. be transported," &c.: it was held, on error brought, that this was no *judgment*; and the court of King's Bench awarded a procedendo to the court below, commanding them to pronounce the proper judgment; *Rex v. Kenworthy*, 3 D. & R. 173; 1 B. & C. 711. But in *Rex v. Ellis*, 8 D. & R. 173, 6 B. & C. 145, that court held, that a judgment of transportation for fourteen years, if bad for excess, was bad in toto, and could

not operate as a good judgment of transportation for seven years; and they refused to send such a judgment back to the court below to be amended, and reversed it on writ of error. And see *Rex v. Flower*, 8 D. & R. 512; 5 B. & C. 736, S. P.

Where error is brought upon a conviction for felony, and after a four day rule has been obtained and served upon the attorney general and the prosecutor, there is no joinder in error, the party convicted is entitled to be discharged out of custody. And the same in error upon a conviction for a misdemeanor; *Rex v. Howe*, 3 Nev. & Man. 462.

tenderness to life and liberty, are not much to the credit or advancement of the national justice (2). These writs of error, to reverse judgments in case of misdemeanors, are not to be allowed of course, but on sufficient probable cause shewn to the attorney general; and then they are understood to be grantable of common right, and *ex debito justitiæ*. But writs of error to reverse attainders in capital cases are only allowed *ex gratiâ*; and not without express warrant under the king's sign manual, or at least by the consent of the attorney general (c). These, therefore can rarely be brought by the party himself, especially where he is attained for an offence against the state: but they may be brought by his heir, or executor, after his death, in more favourable times; which may be some consolation to his family. But the easier, and more effectual way, is,

or by act of parliament, as matter of favour.

Lastly, to reverse the attainder by Act of Parliament. This may be and hath been frequently done, upon motives of compassion, or perhaps from the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honours, and estate, or some, or one of them, by Act of Parliament, which, so far as it extends, has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence.

Where outlawry is reversed, the party is restored to the same situation as if he had appeared to the *capias*; where a judgment or conviction is reversed, the party stands as if never accused.

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The effect of falsifying, or reversing, an outlawry is that the party shall be in the same plight as if he had appeared upon the *capias*: and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law: for all the other proceedings, except only the process of outlawry for his non-appearance, *remain good and effectual as before. But when judgment, pronounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had

(c) 1 Vern. 170, 175.

(2) Vide *ante* 306, note (7), 376, note (1), where it will be seen that the informalities mentioned in the text, no

longer furnish grounds for reversing a judgment.

never been at all accused; restored in his credit, his capacity, his blood, and his estates: with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseisor (*d*). But he still remains liable to another prosecution for the same offence: for, the first being erroneous, he never was in jeopardy thereby.

(*d*) 2 Hawk. P. C. 462.

CHAPTER XXXI.

OF REPRIEVE AND PARDON.

Reprieve and
pardon.

I. Reprieve is
ex arbitrio ju-
dicis, on various
grounds;

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

1. A reprieve, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time: whereby the execution is suspended. 'This may be, first, *ex arbitrio judicis*; either before or after judgment; as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes if it be a small felony, or any favourable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right (a).

ex necessitate
legis, as for
pregnancy, &c. ;

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Reprieves may also be *ex necessitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy *dictated by the law of nature, *in favorem prolis*; and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty that was exercised in the island of Guernsey, of burning a woman big with child: and when, through the violence of the flames, the infant sprang forth, at the stake, and was preserved by the by-standers, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic (b). A barbarity which they never learned from the laws of *ancient Rome*; which direct (c), with the same hu-

(a) 2 Hal. P. C. 412.

(b) Fox, Acts and Mon.

(c) Ff. 48, 19, 3.

manity as our own, "*quod prægnantis mulieris damnatæ pœna differatur, quoad pariat* (1):" which doctrine has also prevailed in England, as early as the first memorials of our law will reach (d). In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact: and if they bring in their verdict *quick with child*, (for barely, *with child*, unless it be alive in the womb, is not sufficient,) execution shall be stayed generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a further respite for that cause (e). For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice (2) (3).

Another cause of regular reprieve is, if the offender become *non compos*, between the judgment and the award of execution (f): for regularly, as was formerly (g) observed, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he *shall not be ordered for execution: for, "*furiosus solo furore punitur*," and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time inter-

or on the ground of insanity, or doubt of identity of person.

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(d) Flet. l. 1, c. 38.

(e) 1 Hal. P. C. 369.

(f) 1 Hal. P. C. 370.

(g) See page 24.

(1) That the punishment of a pregnant woman shall be delayed, until she has been delivered.

(2) It is usual for the clerk of assize to ask women, who receive sentence of death, if they have any thing to say, why execution shall not be awarded according to the judgment. As the execution of the law in the first instance is respited not from a regard for the mother, but from tenderness towards the innocent infant; if then it

should happen that she become quick of a second child, this surely is as much an object of compassion and humanity as the first.—CH.

(3) There is also the reprieve called "*ex mandato regis*," or from the mere pleasure of the crown, expressed in any way to the court by whom execution is to be awarded; see 1 Hale, P. C. 368; 2 id. 412; 2 Hawk. P. C. c. 51, § 8. As to reprieves in general, see 1 Chit. Cr. L. 757-62.

venes between the attainder and the award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him: and if he appears to be insane, the judge in his discretion may and ought to reprieve him (4). Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, *viz.* that he is not the same that was attainted, and the like. In this last case a jury shall be empannelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instanter* (h), and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted (i): neither shall any peremptory challenges of the jury be allowed the prisoner (j); though formerly such challenges were held to be allowable, wherever a man's life was in question (k).

(h) 1 Sid. 72. See Append. § 3.

(i) Fost. 42.

(j) 1 Lev. 61; Fost. 42, 46.

(k) Staundf. P. C. 163; Co. Litt. 157; Hall. Sum. 259.

(4) As to the treatment of insane persons generally, vide *ante*, 24-5, notes (2) (3) and (4). As to the arraignment and trial of insane persons, vide 39 & 40 Geo. III. c. 94, §§ 1 & 2, set out *ante* 324, note (5). By § 3 of the same statute, persons suspected of insanity, and of committing a crime, may be committed by a justice of the peace, without bail, except by two justices, one of whom shall be the justice who issued the warrant, or by the quarter sessions, or by one of the judges, or by the lord chancellor, lord keeper, or lords commissioners of the great seal. And by § 4, where there is reason to apprehend danger to his Majesty's person from the intrusion of any lunatic, and this appears upon his examination before the privy council, or one of the secretaries of state, the lord chancellor may issue a commission of lunacy to inquire whether such person is insane, and whether danger may be appre-

hended to his Majesty's person; and if a jury so find, the lord chancellor may take order for the safe custody of the lunatic as long as there is reason to apprehend such danger. With reference to the third section of this statute, it was very recently held by the court of K. B., that a warrant of commitment stating that "A. had been discovered and apprehended under circumstances that denoted a derangement of mind, and a purpose of committing a crime, (that is to say, an assault and breach of the peace,) for which, if committed, he would be liable to be indicted, and that it appeared to the justice that he ought to issue a warrant for committing him as a dangerous person, suspected to be insane," sufficiently expressed the cause of commitment, within the meaning of the statute: and the court refused to discharge the prisoner; *ex parte* Gourlay, 1 M. & R. 619; 7 B. & C. 669.

II. If neither pregnancy, insanity, non-identity, nor other plea, will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon*; the granting of which is the most amiable prerogative of the crown. Law, says an able writer, cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation oath, and it is that act of his government, which is the most personal, and most entirely his own (*l*). The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is *mercy. His power of pardoning was said by our Saxon ancestors (*m*) to be derived *a lege suæ dignitatis*: and it is declared in parliament, by stat. 27 Hen. VIII. c. 24, that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm (*n*).

II. Pardon is the most absolute and amiable prerogative of the crown.

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This is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons, according to some theorists (*o*), should be excluded in a perfect legislation, where punishments are mild but certain: for that the clemency of the prince seems a tacit disapprobation of the laws. But the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter (*p*); or else it must be holden, what no man will seriously avow, that the situation and circumstances of the offender, though they alter not the essence of the crime, ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws: and it would

(*l*) Law of Forfeit, 99.

(*m*) LL. Edw. Conf. c. 18.

(*n*) And this power belongs only to a king *de facto*, and not to a king *de*

jure during the time of usurpation.

(Bro. Abr. t. Charter de Pardon, 22.)

(*o*) Beccar. ch. 46.

(*p*) Ibid. ch. 4.

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be impolitic for the power of judging and of pardoning to centre in one and the same person. This, as the president Montesquieu observes (*q*), would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell, whether a prisoner were discharged by his innocence, or obtained a pardon through favour. In *Holland, therefore, if there be no stadtholder, there is no power of pardoning lodged in any other member of the state. But in monarchies the king acts in a superior sphere; and, though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him, therefore, the people look up as the fountain of nothing but bounty and grace; and these repeated acts of goodness coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.

Under this head of pardons, let us briefly consider, 1. The *object* of pardon: 2. The *manner* of pardon: 3. The method of *allowing* a pardon: 4. The *effect* of such pardon, when allowed.

Its object is limited.

1. And, first, the king may pardon all offences merely against the crown, or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the *habeas corpus* Act, 31 Car. II. c. 2, made a *præmunire*, unpardonable even by the king. Nor, 2. Can the king pardon, where private justice is principally concerned in the prosecution of offenders: *non potest rex gratiam facere cum injuriâ et damno aliorum* (*r*) (5).” Therefore in appeals of all kinds (which are the suit, not of the king, but of the party injured) the prosecutor may release, but the king cannot pardon (*s*). Neither can he par-

(*q*) Sp. L. b. 6, c. 5.

(*s*) Ibid. 237.

(*r*) 3 Inst. 236.

(5) Even the king cannot extend his mercy to an individual, when by so doing he must compromise the interests of the public.

don a common nuisance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may remit the fine: because though the prosecution is vested in the king to avoid multiplicity of suits, yet, during its continuance, this offence savours more of the nature of a *private* *injury to each individual in the neighbourhood, than of a *public* wrong (*t*). Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty (*v*).

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There is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; *viz.* that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the earl of Danby was impeached by the house of Commons of high treason, and other misdemeanors, and pleaded the king's pardon in bar of the same, the commons alleged (*u*), "that there was no precedent that ever any pardon was granted to any person impeached by the commons of high treason, or other high crimes, *depending the impeachment*;" and thereupon resolved (*w*), "that the pardon so pleaded was illegal and void, and ought not to be allowed *in bar* of the impeachment of the commons of England;" for which resolution they assigned (*x*) this reason to the house of Lords, "that the setting up a pardon to be a *bar* of an impeachment defeats the whole use and effect of impeachments; for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed." Soon after the revolution, the commons renewed the same claim, and voted (*y*), "that a pardon is not *pleadable in bar* of an impeachment." And, at length, it was enacted by the act of Settlement, 12 and 13 W. III. c. 2, "that no pardon under the great seal of England shall be *pleadable* to an impeachment by the commons in parliament." But, after the impeachment has been solemnly heard and determined, it is not understood that the *king's royal grace is

It cannot be pleaded to an impeachment by the commons in parliament, though after the impeachment is determined, it seems the king may reprieve and pardon.

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 (*t*) 2 Hawk. P. C. 391.

 (*v*) 3 Inst. 238.

 (*u*) Com. Journ. 28 Apr. 1679.

 (*w*) Ibid. 5 May, 1679.

 (*x*) Ibid. 26 May, 1679.

 (*y*) Ibid. 6 June, 1689.

further restrained or abridged: for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon (6).

Its manner also is limited.

2. As to the *manner* of pardoning. 1. First, it must be under the *great* seal. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon, when ob-

(6) The following remarkable record, in which it is both acknowledged by the commons and asserted by the king, proves that the king's prerogative to pardon delinquents convicted in impeachments, is as ancient as the constitution itself.

Item prie la commune a nostre dit seigneur le roi que nul pardon soit grante a nully persone, petit ne grande, q'ont este de son conseil et serementez, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tenemenz, biens, ou chateux, lesqueux sont lou serront trovez en aucun default encontre leur ligeance, et la tenure de leur dit serement; mais q'ils ne serront jammes conseillers ne officers du roi, mais en tout oustez de la courte le roi et de conseil as touz jours. Et sur ceo soit en present parlement fait estatut s'il plect au roi, et de touz autres en temps a venir en cas semblables, pur profit du roi et du roialme.

*Responsio: Le roi ent fra sa volente, come mieltz lui semblera; Rot. Parl. 50 Edw. III. n. 188.**

After the lords have delivered their sentence of guilty, the commons have the power of pardoning the impeached convict, by refusing to demand judgment against him, for no judgment can be pronounced by the lords till it is demanded by the commons. Lord Macclesfield was found guilty without a dissenting voice in the house of Lords; but when the question was afterwards proposed in the house of Commons, *that this house will demand judgment of the lords against Thomas earl of Macclesfield*, it occasioned a warm debate, but (the previous question being first moved) it was carried in the affirmative by a majority of 136 voices against 65; Comm. Journ. 27 May, 1725; 6 H. St. Tr. 762. In the impeachment of Warren Hastings, esq. it was decided, after much serious and learned investigation and discussion, by a very great majority in each house of parliament, that an impeachment was not abated by a dissolution of the parliament, though almost all the legal characters of each house voted in the minorities.—CH.

* Also, the commons pray our said lord the king that no pardon shall be granted to any person, high or low, who has been of his council, and oath, and is impeached in the present parliament of life or of limb, fine or ransom, of forfeiture of lands, tenements, goods or chattels, and who is or shall be found in any default against his allegiance, and the holding of his said

oath; but that such shall never more be a counsellor or officer of the king, but shall be wholly ousted from the court and council of the king for ever. And so let it be deemed in the present parliament, if it please the king, and for all times to come in like cases for the good of the king and the realm.

Answer: The king will declare his pleasure, as shall seem best to him.

tained in proper form, yet is not of itself a complete irrevocable pardon (z) (7). 2. Next it is a general rule, that wherever it may reasonably be presumed the king is deceived, the pardon is void (a). Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed (b). 3. General words have also a very imperfect effect in pardons. A pardon

(z) 5 St. Tr. 166, 173.

(b) 3 Inst. 238.

(a) 2 Hawk. P. C. 383.

(7) By 7 & 8 Geo. IV. c. 28, § 13, it is enacted, "that where the king's majesty shall be pleased to extend his royal mercy to any offender convicted of felony, punishable with death or otherwise, and by warrant under his royal sign manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or conditional pardon: the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall be so granted. Provided, always, that no free pardon, nor any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction, for any felony committed after the granting of any such pardon." This section is in substance a re-enactment of sect. 1 of the unrepealed statute 6 Geo. IV. c. 25, with the exception of the proviso, which is new.

A proclamation *promising* a pardon cannot be pleaded as a pardon; *Rex v. Garside*, 4 Nev. & Man. 33.

But where such a proclamation had been made, the court of King's Bench, into which the prisoners, convicted of murder, had been brought by habeas

corpus, and the record of this conviction by certiorari, deferred awarding execution of the sentence of death, until the prisoners should have had time to apply to the secretary of state for a pardon; *Id. Ibid.*

Seem, that a pardon after judgment may be pleaded *ore tenus*, and that there may be a demurrer to such plea *ore tenus*; *Id. Ibid.*

By 30 Geo. III. c. 47, the king may authorize the governor of any place to which convicts are transported, to remit, either absolutely or conditionally, the whole, or any part of their term of transportation; which remission shall be of the same effect as if his Majesty had signified his intention of mercy under the sign manual; and the names of such convicts are to be inserted in the next general pardon which shall pass the great seal.

And by sect. 26 of the 5 Geo. IV. c. 84, it is enacted, that a felon under sentence or order of transportation, receiving a remission of the sentence from the governor of New South Wales, or any other colony, who may be authorized to grant the same, while such felon shall reside in a place where he may lawfully reside, under such sentence, order, or remission, may sue for the recovery of any property acquired by him since his conviction, or for any damage or injury sustained by him. This enactment was introduced shortly after the decision of the court of K. B. in the case of *Bullock v. Dodds*, 2 B. & A. 258, which see *ante*, 371, note (2).

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of all felonies will not pardon a conviction or attainder of felony, (for it is presumed the king knew not of those proceedings,) but the conviction or attainder must be particularly mentioned (*c*); and a pardon of felonies will not include piracy (*d*); for that is no felony punishable at the common law. (8) 4. It is also enacted by statute 13 Ric. II. st. 2, c. 1, that no pardon for treason, murder, or rape, shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense. Upon which Sir Edward Coke observes (*e*), that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide, than that *which happens *se defendendo* or *per infortunium*: to which two species the king's pardon was expressly confined by the statutes 2 Edw. III. c. 2, and 14 Edw. III. c. 15, which declare that no pardon of homicide shall be granted, but only where the king may do it *by the oath of his crown*: that is to say, where a man slayeth another in his own defence, or by misfortune. But the statute of Richard the second, before mentioned, enlarges by implication the royal power: provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a *non obstante* of the statute of king Richard, till the time of the revolution; when the doctrine of *non obstante* ceasing, it was doubted whether murder could be pardoned generally; but it was determined by the court of King's Bench (*f*), that the king

(*c*) 2 Hawk. P. C. 383.(*e*) 3 Inst. 236.(*d*) 1 Hawk. P. C. 99.(*f*) Salk. 499.

(8) The statute of 28 Hen. VIII. c. 15, does not alter the nature of the offence of piracy, so as to make that which was before a felony only by the civil law, now become a felony by the common law; 1 Hawk. P. C. c. 20,

§ 11. The offence of piracy, therefore, remains, as before, of a special nature, and is not included in a general pardon of all felonies; Id. § 12; 3 Inst. 112; F. Moor, 756; Collyer's Cr. St. 498, note.

may pardon on an indictment of murder, as well as a subject may discharge an appeal. Under these, and a few other restrictions, it is a general rule, that a pardon shall be taken most beneficially *for* the subject, and most strongly against the king.

A pardon may also be *conditional*; that is, the king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law (*g*). Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country for life, or for a term of years; such transportation or banishment (*h*) being allowable and warranted by the *habeas corpus* Act, 31 Car. II. c. 2, sec. 14, and both the imprisonment and transportation rendered more easy and effectual by statutes 8 Geo. III. c. 15, and 19 Geo. III. c. 74 (*9*).

(*g*) 2 Hawk. P. C. 394.

(*h*) Transportation is said (Bar. 352)

to have been first inflicted as a punishment, by statute 39 Eliz. c. 4.

(9) The 8 Geo. III. c. 15, is repealed by the 5 Geo. IV. c. 84, and the 19 Geo. III. c. 74, by the 7 & 8 Geo. IV. c. 27; and by 9 Geo. IV. c. 32, § 3, reciting, that it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged, it is enacted, that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted; provided always that nothing therein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony.

This Act is entitled, "An Act for

amending the law of evidence in certain cases," and it was doubtless the object, as it is the effect, of the enactment in the third section, to restore to the party therein mentioned his competency as a witness.

It has been held that in order to establish the incompetency of a witness on the ground of infamy, the judgment against him must be proved in the usual way: and that an admission by the witness himself, that he is confined under such judgment, is not sufficient to render him incompetent, however it may affect his credit; *Rex v Castle Careinion*, 8 East, 78. It has also been held that a person convicted of felony, sentenced to transportation, confined in the hulks for the term, and discharged at the end of it, was a competent witness; such confinement operating as a statute pardon: and that his having escaped twice during such confinement for a few hours each time, did not destroy the effect of the pardon; *Rex v Badcock*, R. & R. C. C. 248.

and may be allowed by act of parliament, or, by charter.

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3. With regard to the manner of *allowing* pardons: we may observe, that a pardon by act of parliament is more *beneficial than by the king's charter; for a man is not bound to plead it, but the court must *ex officio* take notice of it (*i*); neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon (*k*). The king's charter of pardon must be specially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon (*l*). But, if a man avails himself thereof, as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in the present stage of proceedings, in bar of execution. Anciently, by statute 10 Edw. III. c. 2, no pardon of felony could be allowed, unless the party found sureties for the good behaviour before the sheriff and coroners of the county (*m*). But that statute is repealed by the statute 5 and 6 W. and M. c. 13, which, instead thereof, gives the judges of the court a discretionary power to bind the criminal, pleading such pardon, to his good behaviour, with two sureties, for any term not exceeding seven years.

Its effect is to make the offender a new man.

4. Lastly, the *effect* of such pardon by the king, is to make the offender a new man: to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him new credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father, because the father being made a new man, might transmit new inheritable blood; though, had he been born before the pardon, he could never have inherited at all (*n*) (10).

(*i*) Fost. 43.

(*m*) Salk. 499.

(*k*) 2 Hawk. P. C. 397.

(*n*) See vol. II. page 254.

(*l*) Ibid. 396.

(10) A son born after the attainder may inherit if he has no elder brother living born before the attainder, other-

wise the land will escheat *pro defectu hæredis*; 1 H. P. C. 358.—CH.

CHAPTER XXXII. OF EXECUTION.

THERE now remains nothing to speak of, but *execution*; Execution, the completion of human punishment, the completion of human punishment. And this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for so doing was anciently by precept under the hand and seal of the judge, as it is still practised in the court of the lord high steward, upon the execution of a peer (*a*): though, in the court of the peers in parliament, it is done by writ from the king (*b*). Afterwards it was established (*c*), that, in case of life, the judge may command execution to be done without any writ. And now the usage is, for the judge to sign the calendar, or list of all the prisoner's names, with their separate judgments in the margin, which is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "let him be hanged by the neck;" formerly, in the days of Latin and abbreviation (*d*), "*sus. per col.*" for "*suspendatur per collum.*" And this is the only warrant that the sheriff has for so material an act as taking away the life of another (*e*). It may certainly afford matter of speculation, that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name, and under the seal of the court, without which the sheriff *cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note (1).

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(*a*) 2 Hal. P. C. 409.

(*d*) Staundf. P. C. 182.

(*b*) See Append. § 5.

(*e*) 5 Mod. 22.

(*c*) Finch. L. 478.

(1) Though it be true that a marginal note of a calendar, signed by the judge, is the only warrant that the sheriff has for the execution of a convict, yet it is made with more caution and solemnity than is represented by

the learned commentator. At the end of the assizes the clerk of assize makes out in writing four lists of all the prisoners, with separate columns, containing their crimes, verdicts, and sentences, leaving a blank column, which

The sheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is also left at large. In London, indeed, a more solemn and becoming exactness is used, both as to the warrant of execution, and the time of executing thereof: for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure, that the law must take its course, issues his warrant to the sheriffs; directing them to do execution on the day and at the place assigned (*f*). And, in the court of King's Bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either specifying the time and place (*g*), or leaving it to the discretion of the sheriff (*h*) (2). And, throughout the kingdom, by statute 25 Geo. II. c. 37, it is enacted, that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed (*i*). But, otherwise, the time and place of execution are by law no part of the judgment (*k*) (3).

(*f*) See Append. § 4.

(*g*) St. Trials, vi. 332; Fost. 43.

(*h*) See Append. § 3.

(*i*) See page 202.

(*k*) So held by the twelve judges, Mich. 10 Geo. III.

the judge fills up opposite the names of the capital convicts by writing, *to be reprieved, respited, transported, &c.* These four calendars, being first carefully compared together by the judge and the clerk of assize, are signed by them, and one is given to the sheriff, one to the gaoler, and the judge and the clerk of assize each keep another. If the sheriff receives afterwards no special order from the judge, he executes the judgment of the law in the usual manner, agreeably to the directions of his calendar.* In every county this important subject is settled with great deliberation by the judge and the clerk of assize, before the judge leaves the assize town; but probably in different counties, with some slight variation, as in Lancashire, no calendar is left with the gaoler, but one is sent to the secretary of state.

If the judge thinks it proper to reprieve a capital convict, he sends a memorial or certificate *to the king's most excellent Majesty*, directed to the secretary of state's office, stating that, from favourable circumstances appearing at the trial, he recommends him to his Majesty's mercy, and to a pardon upon condition of transportation or some slight punishment. This recommendation is always attended to.—CH.

(2) The court of K. B. has authority to order the sheriff of any county, or the marshal of the court, to carry into execution a sentence of death, pronounced by a judge under a commission of oyer and terminer and general gaol delivery; *Rex v. Garside*, 4 Nev. & Man. 33.

(3) Vide *ante*, 202, latter part of note (55).

* Vide *post*, n. (3).

It has been well observed (*l*), that it is of great importance, that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas: and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression (*4*).

The sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself, as has been formerly said (*m*). It is held also *by Sir Edward Coke (*n*) and Sir Matthew Hale (*o*), that even the king cannot change the punishment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest. And, notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains, that "*judicandum est legibus, non exemplis*." But others have thought (*p*), and more justly, that this prerogative, being founded in mercy, and immemorially exercised by the crown, is part of the common law. For, hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons, (*viz.* by remitting a severe kind of death, on condition that the criminal submits to a milder,) is a matter that may bear consideration. It is observable, that when Lord Stafford was executed for the popish plot in the reign of king Charles the Second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of Lords, for a command or order from their lordships,

must be performed strictly in the manner which the law directs,
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(*l*) Beccar. ch. 19.

(*m*) See page 179.

(*n*) 3 Inst. 52.

(*o*) 2 Hal. P. C. 412.

(*p*) Fost. 270, F. N. B. 244, h. 19 Rym. Foed. 284.

(4) A sheriff is not bound upon service on him of a copy of the calendar of prisoners, signed by a judge of gaol delivery at the assizes, to execute prisoners upon whom sentence of death has been passed, unless such prisoners are in his legal custody; *Rex v. Antrobus*, 4 Nev. & Man. 565.

But where the sheriff has the cus-

tody of the prisoner, the judgment of the court passing sentence of death upon him, is, without any warrant or copy of the calendar, sufficient to authorize and require the sheriff to do execution: for the copy of the calendar, signed by the judge, is a mere memorial; *id. ibid.*

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how the said judgment should be executed; for, he being prosecuted by impeachment, they entertained a notion (which is said to have been countenanced by Lord Russel) that the king could not pardon any part of the sentence (*q*). The lords resolved (*r*), that the scruples of the sheriffs were unnecessary, and declared, that the king's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified (*s*) to the house of Commons by one of the members, that they were not satisfied as to the power of the said writ. That house took two days to consider of it; and then (*t*) sullenly resolved, that the house was *content* that the sheriff do execute Lord Stafford, by severing his head from his body. It is further related, that when afterwards the same Lord Russel was condemned for high treason upon indictment, the king, while he remitted the ignominious part of *the sentence, observed, "that his lordship would now find he was possessed of that prerogative, which, in the case of Lord Stafford, he had denied him (*u*)."
One can hardly determine, at this distance from those turbulent times, which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

and effectually.

To conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again (*w*). For the former hanging was no execution of the sentence; and, if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force (*x*), such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer (*y*).

And, having thus arrived at the *last* stage of criminal proceedings, or execution, the end and completion of human *punishment*, which was the sixth and last head to be considered under the division of *public wrongs*, the fourth and last object of the laws of England; it may now seem high time to put a period to these Commentaries, which, the au-

(*q*) 2 Hum. Hist. of G. B. 328.(*r*) Lords' Journ. 21 Dec. 1680.(*s*) Com. Journ. 21 Dec. 1680.(*t*) Ibid. 23 Dec. 1680.(*u*) 2 Hume, 360.(*w*) 2 Hal. P. C. 412; 2 Hawk.

P. C. 463.

(*x*) See page 326.(*y*) Fitzh. Abr. t. Corone, 335;

Finch. L. 467.

thor is very sensible, have already swelled to too great a length. But he cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavouring to recall to his memory some principal outlines of the legal constitution of this country; by a short historical review of the most considerable revolutions, that have happened in the laws of England, from the earliest to the present times. And this task he will attempt to discharge, however imperfectly, in the next or concluding chapter.

CHAPTER XXXIII.
OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS, OF THE LAWS OF ENGLAND.

BEFORE we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations, that have happened in the laws of England, I must first of all remind the student, that the rise and progress of many principal points and doctrines have been already pointed out in the course of these Commentaries, under their respective divisions; these having, therefore, been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness; which would be a most tedious undertaking. What I, therefore, at present propose, is only to mark out some outlines of our English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

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The several periods, under which I shall consider the state of our legal polity, are the following six: 1. From the earliest times to the Norman conquest: 2. From the Norman conquest to the reign of King Edward the First: 3. From thence to the reformation: 4. From the reformation to the *restoration of king Charles the second: 5. From thence to the revolution in 1688: 6. From the revolution to the present time.

I. And, first, with regard to the Ancient Britons, the *aborigines* of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Cæsar's account of the tenets and discipline of the ancient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey,) to be instructed; we may collect a few points, which bear a great affinity and resemblance to some of the modern

doctrines of our English law. Particularly the very notion itself of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters: since it is remarkable that in all the antiquities, unquestionably British, which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII., is undoubtedly of British original. So likewise is the ancient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume, where the same custom has continued from Cæsar's time to the present; that of burning a woman guilty of the crime of petit treason by killing her husband (1).

The great variety of nations, that successively broke in upon and destroyed both the British inhabitants and *con-
stitution, the Romans, the Picts, and, after them, the va-
rious clans of Saxons and Danes, must necessarily have
caused great confusion and uncertainty in the laws and an-
tiquities of the kingdom; as they were very soon incorporated
and blended together, and therefore we may suppose, mu-
tually communicated to each other their respective usages (a),
in regard to the rights of property and the punishment of
crimes. So that it is morally impossible to trace out with any
degree of accuracy, *when* the several mutations of the common
law were made, or what was the respective original of those
several customs we at present use, by any chemical resolution
of them to their first and component principles. We can
seldom pronounce, that *this* custom was derived from the
Britons; *that* was left behind by the Romans; *this* was a
necessary precaution against the Picts; *that* was introduced
by the Saxons, discontinued by the Danes, but afterwards
restored by the Normans.

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(a) Hal. Hist. C. L. 62.

(1) But this is now altered by 9 Geo. IV. c. 31. Vide *ante*, 204, note (56).

Wherever this can be done, it is a matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice (*b*); so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government, which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of its laws; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses (*c*). Thirdly, *this uncertainty of the true origin of particular customs must also in part have arisen from the means, whereby christianity was propagated among our Saxon ancestors in this island; by learned foreigners brought over from Rome and other countries, who undoubtedly carried with them many of their own national customs: and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause, that we find not only some rules of the mosaical, but also of the imperial and pontifical laws, blended and adopted into our own system.

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A further reason may also be given for the great variety, and of course the uncertain original, of our ancient established customs; even after the Saxon government was firmly established in this island: *viz.* the subdivision of the kingdom into an heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally sprung from the same mother country, the great northern hive; which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will

(*b*) Hal. Hist. C. L. 57.(*c*) Ibid. 59.

necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments : and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen where seven unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

When, therefore, the West Saxons had swallowed up all the rest, and king Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as *masterly a manner : no less than to new-model the constitution ; to rebuild it on a plan that should endure for ages ; and, out of its old discordant materials, which were heaped upon each other in a vast and rude irregularity, to form one uniform and well-connected whole. This he effected, by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was answerable to his immediate superior for his own conduct and that of his nearest neighbours : for to him we owe that masterpiece of judicial polity, the subdivision of England into tithings and hundreds, if not into counties ; all under the influence and administration of one supreme magistrate, the king ; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating ducts and channels ; which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his Som-bec, or *liber judicialis*. This he compiled for the use of the court-baron, hundred, and county-court, the court-leet, and sheriff's tourn ; tribunals, which he established, for the trial of all causes civil and criminal, in the very districts wherein the complaint arose : all of them subject, however, to be inspected, controlled, and kept within the bounds of the universal or common law, by the king's own courts ; which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses which he continually made from one end of the kingdom to the other.

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The Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric : but a plan so excellently concerted, could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their ancient law ; retaining, however, some few of the customs of their late visitants ; which went *under the name of *Dane Lage* : as the code compiled by Alfred was called the *West-Saxon Lage* ; and the local constitutions of the ancient kingdom of Mercia, which obtained in the counties nearest to Wales, and probably abounded with many British customs, were called the *Mercen Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm : the provincial polity of counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution ; though the laws and customs therein used have, as we shall see, often suffered considerable changes.

For king Edgar, (who, besides his military merit, as founder of the English navy, was also a most excellent civil governor,) observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and begun what his grandson king Edward the Confessor afterwards completed ; viz. one uniform digest or body of laws to be observed throughout the whole kingdom ; being probably no more than a revival of king Alfred's code, with some improvements suggested by necessity and experience ; particularly the incorporating some of the British, or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon Lage*, which was still the groundwork of the whole. And this appears to be the best supported and most plausible conjecture, for certainty is not to be expected, of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of the *common law*, as extending its authority universally over all the realm ; and which is doubtless of Saxon parentage.

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Among the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliaments, or rather, general assemblies of the principal and wisest men in the nation : the *wittena-gemote*, or *commune consilium* of the ancient Germans, which was not yet reduced to the forms and *distinc-

tions of our modern parliament; without whose concurrence, however, no new law could be made, or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their portreeves, (since changed into mayors and bailiffs,) and even their tything-men and borsholders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued; only that, perhaps, in case of minority, the next of kin of full age would ascend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offence: even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feudal constitution; but yet were exempt from all its rigorous hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feudal law: before it got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands to all the males equally, without any right of primogeniture; a custom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman *conquest: though really inconvenient, and more especially destructive to ancient families; which are in monarchies necessary to be supported, in order to form and keep up a nobility, or intermediate state between

the prince and the common people. 8. The courts of justice consisted principally of the county-courts, and in cases of weight or nicety the king's court held before himself in person, at the time of his parliaments; which were usually holden in different places, according as he kept the three great festivals of Christmas, Easter, and Whitsuntide: an institution which was adopted by king Alonso VII. of Castile, about a century after the conquest: who at the same three great feasts was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home (*d*). These county-courts, however, differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman or sheriff sitting in the same county-court; and also that the decisions and proceedings therein were much more simple and unembarrassed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials, among a people who had a very strong tincture of superstition, were permitted to be by *ordeal*, by the *corsned* or morsel of execration, or by *wager of law* with compurgators, if the party chose it; but frequently they were also by *jury*: for, whether or no their juries consisted precisely of twelve men, or were bound to a strict unanimity; yet the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors. Thus stood the general frame of our polity at the time of the Norman invasion; when the second period of our legal history commences.

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II. This remarkable event wrought as great an alteration in our laws, as it did in our ancient line of kings: and though the alteration of the former was effected rather by the *consent of the people, than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. Among the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavouring all over

(*d*) Mod. Un. Hist. xx. 114,

Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because, the disposal of all the episcopal fees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. Another violent alteration of the English constitution consisted in the depopulation of whole countries, for the purposes of the king's royal diversion; and subjecting both them, and all the ancient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone; and no man was entitled to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express licence from the king, by a grant of a chase or free-warren: and those franchises were granted as much with a view to preserve the breed of animals, as to indulge the subject. From a similar principle to which, though the forest laws are now mitigated, and by degrees *grown entirely ob-
[*416]solete, yet from this root has sprung a bastard slip, known by the name of the game law, now arrived to and wantoning in its highest vigour: both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons: but with this difference; that the forest laws established only one mighty hunter throughout the land, the game laws have raised a little Nimrod in every manor. And in one respect the ancient law was much less unreasonable than the modern: for the king's grantee of a chase or free-warren might kill game in every part of his franchise; but now, though a freeholder of less than 100*l.* a-year is forbidden to kill a partridge upon his own estate, yet nobody else (not even the

lord of the manor, unless he hath a grant of free-warren) can do it without committing a trespass, and subjecting himself to an action (2).

3. A third alteration in the English laws was by narrowing the remedial influence of the county-courts, the great seats of Saxon justice, and extending the *original* jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis*, with all its multifarious authority, was erected; and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy; and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman, instead of the English language: a provision the more necessary, because none of his Norman justiciars understood English; but as evident a badge of slavery, as ever was imposed upon a conquered people. This lasted till king Edward the third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home: but there was one mischief too deeply rooted thereby, and which this caution of

[*317] *king Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county-courts, the chicanes and subtleties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed, that age, and those immediately succeeding it, were the æra of refinement and subtlety. There is an active principle in the human soul, that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and country, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those, who had leisure to cultivate its progress, were such only as were cloistered in monasteries, the rest being all soldiers or peasants: and, unfortunately, the first rudi-

(2) Vide *ante*, 174, note (31), et seq.

ments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind; the establishment of religion, and the regulations of civil polity, yet having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtleties, with a skill most amazingly artificial; but which serves no other purpose, than to shew the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which, being intended for universal reception, ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon feudal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede, as they did in great measure, the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth, these *scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour; and the endeavour has greatly succeeded: but still the scars are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions, and circuities, in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

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4. A fourth innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century: and from them it passed to other nations, particu-

larly the Franks and the Normans; which last had the honour to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. But the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisins, wardships, marriages, escheats, and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.

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The nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, an *ambitious, and a politic prince, to create. The consciences of men were enslaved by four ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived; who now imported from Rome for the first time the whole *farrago* of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws, too, as well as the prayers, were administered in an unknown tongue. The ancient trial by jury gave way to the impious decision by battle. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfew*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all,

as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty thousand knights or *milites*: who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandise, such as it then was, was carried on by the Jews and Lombards; and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who from their insignificance happily retained in their socage and burgage tenure, some *points of their ancient freedom. All the rest were villeins or bondmen.

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From so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors, to redeem themselves and their posterity into that state of liberty, which we now enjoy: and which, therefore, is not to be looked upon as consisting of mere encroachments on the crown, and infringements on the prerogative, as some slavish and narrow-minded writers in the last century endeavoured to maintain: but as, in general, a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has, in a long series of years, been step by step effected, I now proceed to inquire.

William Rufus proceeded on his father's plan, and in some points extended it; particularly with regard to the forest laws. But his brother and successor, Henry the first, found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring, as our monkish historians tell us, the laws of king Edward the Confessor. The ground whereof is this: that by charter he gave up the great grievances, of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feudal tenures; but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the *curfew* (e); for, though it is mentioned in our laws a full century afterwards (f),

(e) Spelm. Codd. LL. W. I. 281, (f) Stat. Civ. Lond. 13 Edw. I. Hen. I. 299.

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yet it is rather spoken of as a known *time* of night (so denominated from that abrogated usage,) than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the Confessor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments, (that of theft being made capital in his reign,) and a few things relating to estates, *particularly as to the descent of lands: which being by the Saxon laws equally to all the sons, by the feudal or Norman to the eldest only, king Henry here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; reserving, however, these ensigns of patronage, *conge d'eslire*, custody of the temporalities when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time: from whence we may easily perceive how far short this was of a thorough restitution of king Edward's, or the Saxon, laws.

The usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign, however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

By the time of king Henry the second, if not earlier, the charter of Henry the first seems to have been forgotten: for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However, in this prince's reign, much was done to methodize the laws, and reduce them into a regular order; as appears from that excellent treatise of Glanvil:

which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the first, *it carries a manifest superiority (*g*). Throughout his reign, also, was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome: the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign, of Henry the second, there are four things which peculiarly merit the attention of a legal antiquary: 1. The constitution of the parliament at Clarendon, A.D. 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction; though his further progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices of eyre, *in itinere*; the king having divided the kingdom into six circuits, (a little different from the present,) and commissioned these new created judges to administer justice, and try writs of assize, in the several counties. These remedies are said to have been then first invented: before which all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expence and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by special kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. 4. To this time must also be referred the introduction of escuage, or pecuniary *commutation for personal military service, which in process

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(*g*) Hal. Hist. C. L. 138.

of time was the parent of the ancient subsidies granted to the crown by parliament, and the land-tax of later times.

Richard the first, a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest laws with some rigour; which occasioned many discontents among his people: though, according to Matthew Paris, he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed, in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron: which are still extant, and of high authority; for in his time we began again to discover, that, as an island, we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the justices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a croisade against the Saracens in the holy land.

In king John's time, and that of his son, Henry the third, the rigours of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which, at last, had this effect, that, first, king John, and afterwards his son, consented to the two famous charters of English liberties, *magna carta*, and *carta de foresta*. Of these the latter was well calculated to redress many grievances and encroachments of the crown, in the exertion of forest law: and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable amercements, from illegal distresses or other process for debts or services due to the crown, and

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*from the tyrannical abuse of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. With respect to private rights: it established the testamentary power of the subject over part of his personal estate, the rest

being distributed among his wife and children ; it laid down the law of dower, as it hath continued ever since ; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern : it enjoined an uniformity of weights and measures ; gave new encouragements to commerce, by the protection of merchant strangers ; and forbad the alienation of lands in mortmain. With regard to the administration of justice ; besides prohibiting all denials or delays of it, it fixed the court of Common Pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses ; and, at the same time, brought the trial of issues home to the very doors of the freeholders, by directing assizes to be taken in the proper counties, and establishing annual circuits ; it also corrected some abuses then incident to the trials by wager of law and of battle ; directed the regular awarding of inquests for life or member ; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer : and regulated the time and place of holding the inferior tribunals of justice, the county-court, sheriff's tourn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports, of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the *great* charter,) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land (3).

(3) The following is the celebrated 29th chapter of *Magna Charta*, the foundation of the liberty of Englishmen :

Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur aut exulet, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terræ. Nulli

vendemus, nulli negabimus, aut differemus rectum vel justitiam. "No free man may be apprehended, or imprisoned, or disseised of his freehold, or liberties, or free customs, or outlawed, or exiled, or in anywise disparaged, nor will we go against him, nor will we send against him, except by the legal judgment of his peers, or the law of the land. To none will we sell, to none will we deny, or delay right or justice."

However, by means of these struggles, the pope in the reign of king John gained a still greater ascendant here, than he ever had before enjoyed; which continued through the long reign of his son, Henry the third: in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive, in Bracton's treatise, a still further improvement in the method and regularity of the common law, especially in the point of pleadings (*h*). Nor must it be forgotten, that the first traces which remain, of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of king John; though omitted in that of Henry III.: and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. The third commences with the reign of Edward the first; who hath justly been styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm (*i*), that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

It would be endless to enumerate all the particulars of these regulations; but the principal may be reduced under the following general heads. 1. He established, confirmed, and settled, the great charter, and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction: and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the King's Bench, Common Pleas, and Exchequer; so as

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*they might not interfere with each other's proper business: to do which, they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to causes of no great amount, according to their primitive institution; though of considerably greater, than by the alteration of the

(*h*) Hal. Hist. C. L. 156.

(*i*) Ibid. 158.

value of money they are now permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes and talliages, levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effect of fines levied in the court of Common Pleas; though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are more ancient than the reign of his father, and those were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies, established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores*. 11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of *elegit*; which was of signal benefit to a trading people: and, upon the same commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade, contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulph, in which all the landed property of the kingdom was in danger of being swallowed, by his reiterated statutes of mortmain; most admirably adapted to meet the frauds that had been devised, though afterwards contrived to be evaded by the invention of uses. *14. He established a new limitation of property by the creation of estates tail; concerning the good policy of which, modern times have, however, entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws, of England, (which was thoroughly completed in the reign of Henry the eighth;) and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

I might continue this catalogue much further: but, upon the whole, we may observe, that the very scheme and model

of the administration of common justice between party and party, was entirely settled by this king (*k*); and has continued nearly the same, in all succeeding ages, to this day; abating some few alterations, which the humour or necessity of subsequent times hath occasioned. The forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings, consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatises, written in his time, as Britton, Fleta, Hengham, and the rest, are for the most part law at this day; or at least *were* so, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact *observation* of *Magna Carta*, rather than from its *making* or *renewal*, in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head; though the weight of the military tenures hung heavy upon it for many ages after.

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I cannot give a better proof of the excellence of his constitutions, than that from his time to that of Henry the eighth there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of *substance*: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and *conservators of the peace, were taken from the people in the reigns of Edward II. and Edward III.; and justices of the peace were established instead of the latter. In the reign also of Edward the third, the parliament is supposed most probably to have assumed its present form; by a separation of the Commons from the Lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple;

whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *præmunire*, for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added lustre to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

From this time to that of Henry the seventh, the civil wars and disputed titles to the crown gave no leisure for further *juridical improvement: "*nam silent leges inter arma.*" And yet it is to these very disputes that we owe the happy loss of all the dominions of the crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the fiction of *common recoveries*, invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward the fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*, another of the clerical inventions.

In the reign of king Henry the seventh, his ministers, not to say the king himself, were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign, was that of amassing treasure in the king's coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object. To this end the court of Star Chamber

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was new modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to aliene. The benefit of clergy, which so often intervened to stop attainders and save the inheritance, was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *capias* was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign, *introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. This brings us to the fourth period of our legal history, *viz.* the reformation of religion, under Henry the eighth, and his children; which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now for ever routed and destroyed, all his connexions with this island cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. And, had the spiritual courts been at this time reunited to the civil, we should have seen the old Saxon constitution with regard to *ecclesiastical* polity completely restored.

With regard also to our *civil* polity, the statute of wills, and the statute of uses, both passed in the reign of this prince, made a great alteration as to property: the former, by allowing the *devise* of real estates by will, which before was in general forbidden; the latter, by endeavouring to destroy the intricate nicety of *uses*, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense: which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which, notwithstanding they may differ in

forms, are now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity, which protected estates for years from being destroyed by the reversioner, a remarkable alteration took place in the mode of conveyancing: the ancient assurance by feoffment and livery upon the land being now very seldom practised, since the more easy and more private invention of transferring property, by secret conveyances to uses, and long terms of years being now continually created in mortgages *and family settlements, which may be moulded to a thousand useful purposes by the ingenuity of an able artist.

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The further attacks in this reign upon the immunity of estates tail, which reduced them to little more than the conditional fees at the common law, before the passing of the statute *de donis*; the establishment of recognizances in the nature of a statute staple, for facilitating the raising of money upon landed security; and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate, trader; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to reassume, of a great commercial people. The incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties-palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy: and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII. a very distinguished æra in the annals of juridical history.

It must be however remarked, that, particularly in his later years, the royal prerogative was then strained to a very tyrannical and oppressive height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which to its eternal disgrace passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and newfangled treasons, which were slightly touched upon in a former chapter (l). Happily for the nation, this arbitrary reign was succeeded by

(l) See page 86.

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the minority of an amiable prince; during the short sunshine of which, great part of these extravagant laws were repealed. And, to do justice to the shorter reign of queen Mary, *many salutary and popular laws, in civil matters, were made under her administration; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well-concerted schemes for effecting which, were, through the providence of God, defeated by the seasonable accession of queen Elizabeth.

The religious liberties of the nation being, by that happy event, established, we trust, on an eternal basis; though obliged in their infancy to be guarded, against papists and other nonconformists, by laws of too sanguinary a nature, the forest laws having fallen into disuse; and the administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward the first, without any material innovations: all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had, through the former abuse of it, gone over to such a contrary extreme, and the princes of the house of Tudor and their favourites had fallen with such avidity upon the spoils of the church, that a decent and honourable maintenance was wanting to many of the bishops and clergy. This produced the *restraining* statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and clothing of millions; by affording them the means, with proper industry, to feed and to clothe themselves. And, the further any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

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However, considering the reign of queen Elizabeth in a

great and political view, we have no reason to regret many subsequent alterations in the English constitution. For, though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet, the increase of the power of the Star Chamber, and the erection of the high Commission Court in matters ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful distance; and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppress individuals; but still she had it to exert; and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to shew, that these were not those golden days of genuine liberty that we formerly were taught to believe: for, surely, the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the sovereign.

The great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power. It is obvious to every observer, that, till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extension of trade, was comparatively small; and the nature of their landed property was such, as kept them in continual dependence upon their feudal lord, being usually some powerful baron, some opulent abbey, *or sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or thought of: nay even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely deli-

vered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler: which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation and the arguments of a Sidney, a Locke, and a Milton.

But when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies; the minds of men thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility, and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury, which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves, and fired with disdain at being rivalled in magnificence by the opulent citizens, fell into enormous expences; to gratify which they were permitted, by the policy of the time, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the *commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burthens or oppressive taxations, during the sudden opulence of the Exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamed of opposing the prerogative, to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were, therefore, the times of the greatest despotism, that have been known in this island since the death of William the Norman: the prerogative, as it then

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stood by common law, and much more when extended by act of parliament, being too large to be endured in a land of liberty.

Queen Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father king Henry the eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the queen of Scots, occasioned greater caution in her conduct. She, probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore drew a veil over the odious part of prerogative ; which was never wantonly thrown aside, but only to answer some important purpose : and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of the people.

*On the accession of king James I., no new degree of royal power was added to, or exercised by, him : but such a sceptre was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported : and common reason assured them, that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leaders felt the pulse of the nation, and found they had ability as well as inclination to resist it ; and accordingly resisted

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and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time, very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For I cannot class the laws against witchcraft and conjuration under the head of improvements; nor did the dispute between Lord Ellesmere and Sir Edward Coke, concerning the powers of the Court of Chancery, tend much to the advancement of justice.

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Indeed when Charles the first succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that *misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the Petition of Right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the crown most unseasonably revived. The legal jurisdiction of the Star Chamber and High Commission courts was also extremely great: though their usurped authority was still greater. And, if we add to these the disuse of parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given; for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the Star Chamber and High Commission courts, for ascertaining the extent of forests and forest laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in consequence of their feudal tenures: though it

must be acknowledged that these concessions were not made with so good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befall a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the examples of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary. Flushed, therefore, with the success they had gained, fired with resentment for past oppressions, *and dreading the consequences if the king should regain his power, the popular leaders, who in all ages have called themselves the *people*, began to grow insolent and ungovernable; their insolence soon rendered them desperate; and despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign. [*438]

I pass by the crude and abortive schemes for amending the laws in the times of confusion which followed; the most promising and sensible whereof, such as the establishment of new trials, the abolition of feudal tenures, the act of navigation, and some others, were adopted in the

V. Fifth period, which I am next to mention, *viz.* after the restoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and consequences of military tenures, were taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the royal government was restored, and with it our ancient constitution, deserves no commendation from posterity, yet in his reign, wicked, sanguinary, and turbulent as it was, the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, since its total abolition at the Conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their

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oppressive appendages, were removed from incumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the *Habeas Corpus* Act. These two statutes, with regard to our property and persons, form a second *Magna Carta*, as beneficial and effectual as that of Runing-Mead. That only pruned the luxuriances of the feudal system; but the statute of Charles the second extirpated all its *slaveries; except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice. *Magna Carta* only, in general terms, declared, that no man shall be imprisoned contrary to law: the *Habeas Corpus* Act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and pre-emption; the statute for holding triennial parliaments; the Test and Corporation Acts, which secure both our civil and religious liberties; the abolition of the writ *de hæretico comburendo*; the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates; and that of amendments and *jeofails*, which cut off those superfluous niceties which so long had disgraced our courts; together with many other wholesome acts that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, "that the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by *law*, in the reign of Charles the second."

It is far from my intention to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What seems incontestible is this, that *by the law* (*m*), as it then stood, notwithstanding some invidious,

(*m*) The point of time at which I would chuse to fix this *theoretical* perfection of our public law, is the year 1679; after the *Habeas Corpus* Act was

passed, and that for licensing the press had expired: though the years which immediately followed it were times of great *practical* oppression.

may dangerous, branches of the prerogative, have since been lopped *off, and the rest more clearly defined, the people had as large a portion of real liberty, as is consistent with a state of society; and sufficient power, residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, resist him; and, in consequence of such resistance, obliged him to quit his enterprize and his throne together. Which introduces us to the last period of our legal history; viz.

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VI. From the revolution in 1688 to the present time. In this period many laws have passed; as the Bill of Rights, the Toleration Act, the Act of Settlement with its conditions, the Act for uniting England with Scotland, and some others: (4) which have asserted our liberties in more clear and emphatical terms; have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed and exemplified the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty, consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the house of Commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have, by the desire of his present Majesty, set bounds to the civil list, and

(4) To these may now be added, the Act for uniting England and Ireland, the Act for the repeal of the Test and Corporation Acts, the Catholic Emancipation Act, the Parliamentary Reform Act, the Law Amendment Act, the Municipal Corporation

Reform Act, various Acts for improving the administration of Criminal Law, and many others, all of which will have been found noticed in suitable places in the course of this volume, and all of which date their origin within the present (19th) century.

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placed the administration of that revenue in hands that are accountable to parliament; and have, by the like desire, made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and *nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the opposite scale, what perhaps the immoderate reduction of the ancient prerogative may have rendered in some degree necessary, the vast acquisition of force, arising from the Riot Act, and the annual expedience of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has, gradually and imperceptibly, gained almost as much in influence, as it has apparently lost in prerogative.

The chief alterations of moment, for the time would fail me to descend to *minutiæ*, in the administration of private justice during this period, are the solemn recognition of the law of nations with respect to the rights of ambassadors: the cutting off, by the statute for the amendment of the law, a vast number of excrescences, that in process of time had sprung out of the practical part of it: the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto*: the regulations of trials by jury, and the admitting witnesses for prisoners upon oath: the further restraints upon alienation of lands in mortmain: the annihilation of the terrible judgment of *peine forte et dure*: the extension of the benefit of clergy, by abolishing the pedantic criterion of reading: the counterbalance to this mercy, by the vast increase of capital punishment: the new and effectual methods for the speedy recovery of rents: the improvements which have been made in ejectments for the trial of titles: the introduction and establishment of paper credit, by indorsements upon bills and notes, which have shewn the legal possibility and convenience, which our ancestors so long doubted, of assigning a *chose in action*: the translation of all legal proceedings into the English language: the erection of courts of conscience for recovering small debts, and, which is much the better plan, the reformation of county-courts: the great system of marine jurisprudence, of which the founda-

tions have been laid, by clearly *developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases: and, lastly, the liberality of sentiment, which, though late, has now taken possession of our courts of common law, and induced them to adopt, where facts can be clearly ascertained, the same principles of redress as have prevailed in our courts of equity, from the time that lord Nottingham presided there; and this, not only where specially empowered by particular statutes, as in the case of bonds, mortgages, and set-offs, but by extending the remedial influence of the equitable writ of trespass on the case, according to its primitive institution by king Edward the first, to almost every instance of injustice not remedied by any other process. And these, I think, are all the material alterations that have happened with respect to private justice, in the course of the present century.

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Thus, therefore, for the amusement and instruction of the student, I have endeavoured to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rise, and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they have gradually emerged, and risen to the perfection they now enjoy, at different periods of time. We have seen, in the course of our inquiries, in this and the former volumes, that the fundamental maxims and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages; that the forms of administering justice came to perfection under Edward the first; and have not been much varied, nor always for the better, since; that our religious liberties were fully established at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained, till after the restoration of king Charles, nor fully and explicitly acknowledged and defined, till the æra of the happy revolution. Of a constitution so wisely contrived, *so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due; the thorough and attentive contemplation of it will furnish its best panegyric. It

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hath been the endeavour of these Commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure: defects, chiefly arising from the decays of time, or the rage of unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY of BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.

APPENDIX.

SECT. 1. RECORD OF AN INDICTMENT AND CONVICTION OF MURDER AT THE ASSIZES.

Warwickshire, } **BE IT REMEMBERED**, that at the general session Session of Oyer
to wit, } of the lord the king of *oyer* and *terminer* holden at and Terminer.
Warwick in and for the said county of Warwick, on Friday the twelfth
day of March in the second year of the reign of the lord George the
third, now king of Great Britain, before sir Michael Foster, knight,
one of the justices of the said lord the king assigned to hold pleas be-
fore the king himself, sir Edward Clive, knight, one of the justices of
the said lord the king, of his court of Common Bench, and others their
fellows, justices of the said lord the king, assigned by letters patent of the
said lord the king, under his great seal of Great Britain, made to them Commission of
the aforesaid justices and others, and any two or more of them, (whereof
one of them the said sir Michael Foster and sir Edward Clive, the said
lord the king would have to be one,) to inquire (by the oath of good and
lawful men of the county aforesaid, by whom the truth of the matter
might be the better known, and by other ways, methods, and means,
whereby they could or might the better known, as well within liberties as
without) more fully the truth of all treasons, misprisions of treasons,
insurrections, rebellions, counterfeittings, clippings, washings, false coin-
ings, and other falsities of the monies of Great Britain, and of other king-
doms or dominions whatsoever; and of all murders, felonies, manslaughter-
ters, killings, burglaries, rapes of women, unlawful meetings and con-
venticles, unlawful uttering of words, unlawful assemblies, misprisions,
confederacies, false allegations, trespasses, riots, routs, retentions,
escapes, contempts, falsities, negligencies, concealments, maintenances,
oppressions, champarties, deceits, and all other misdeeds, offences,
and injuries whatsoever, and also the accessaries of the same, within
the county aforesaid, as well within liberties as without, by whom-
soever and howsoever done, had, perpetrated, and committed, and by
whom, to whom, when, how, and in what manner; and of all other
articles and circumstances in the said letters patent of the said lord
the king specified; the premises and every or any of them howsoever
concerning; and for this time to hear and determine the said treasons
and other the premises, according to the law and custom of the
realm of England; and also keepers of the peace, and justices of oyer and ter-
the said lord the king, assigned to hear and determine divers miner,
felonies, trespasses, and other misdameanors committed within the and of the
peace.

Grand jury-

Indictment.

*Capias.*Session of gaol
delivery.

Arraignment.

county aforesaid, by the oath of sir James Thomson, baronet, Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Phillips, John Mayo, Richard Savage, William Bell, James Morris, Laurence Hall, and Charles Carter, esquires, good and lawful men of the county aforesaid, then and there empanelled, sworn, and charged to inquire for the said lord the king, and for the body of the said county, it is presented; THAT Peter Hunt, late of the parish of Lighthorne in the said county, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of March in the said second year of the reign of the said lord the king, at the parish of Lighthorne aforesaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the said lord the king then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Peter Hunt, with a certain drawn sword, made of iron and steel, of the value of five shillings, which he the said Peter Hunt in his right hand then and there had and held, him the said Samuel Collins, in and upon the left side of the belly of him the said Samuel Collins, then and there feloniously, wilfully, and of his malice aforethought, did strike, thrust, stab, and penetrate; giving unto the said Samuel Collins, then and there, with the sword drawn as aforesaid, in and upon the left side of the belly of him the said Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which said mortal wound he the said Samuel Collins, at the parish of Lighthorne aforesaid in the said county of Warwick, from the said fifth day of March in the year aforesaid until the seventh day of the same month in the same year, did languish, and languishing did live; on which said seventh day of March in the year aforesaid, the said Samuel Collins, at the parish of Lighthorne aforesaid, in the county aforesaid, of the said mortal wound did die: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Peter Hunt him the said Samuel Collins, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of the said lord the now king, his crown, and dignity. WHEREUPON the sheriff of the county aforesaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the said Peter Hunt, if he may be found in his bailiwick, and him safely keep, to answer to the felony and murder whereof he stands indicted. WHICH said indictment the said justices of the lord the king above named, afterwards, to wit, at the delivery of the gaol of the said lord the king, holden at Warwick in and for the county aforesaid, on Friday the sixth day of August, in the said second year of the reign of the said lord the king, before the right honourable William lord Mansfield, chief justice of the said lord the king, assigned to hold pleas before the king himself, sir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the said lord the king, and others their fellows, justices of the said lord the king, assigned to deliver his said gaol of the county aforesaid of the prisoners therein being, by their proper hands do deliver here in court of Record in form of the law to be determined. AND AFTERWARDS, to wit, at the same delivery of the gaol of the said lord the king of his county aforesaid, on the said Friday the sixth day of August, in the said second year of the reign of the said lord the king, before the said justices of the lord the king last above named and others their fellows aforesaid, here cometh the said Peter Hunt, under the custody of William Brown, esquire, sheriff of the county aforesaid, (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed,) being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed: AND forthwith being demanded concerning the premises in the said indict-

ment above specified and charged upon him, how he will acquit himself thereof, he saith, that he is not guilty thereof; and thereof for good and evil he puts himself upon the country: AND John Blencowe, esquire, clerk of the assizes for the county aforesaid, who prosecutes for the said lord the king in this behalf, doth the like: THEREFORE let a jury thereupon here immediately come before the said justices of the lord the king last above mentioned, and others their fellows aforesaid, of free and lawful men of the neighbourhood of the said parish of Lighthorne in the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Peter Hunt, to recognise upon their oath, whether the said Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified, or not guilty: because as well the said John Blencowe, who prosecutes for the said lord the king in this behalf, as the said Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury by the said sheriff for this purpose empanelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Nash, and Henry Long, being called, come; who being elected, tried, and sworn, to speak the truth of and concerning the premises, upon their oath say, THAT the said Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid, as by the indictment aforesaid is above supposed against him; and that the said Peter Hunt at the time of committing the said felony and murder, at any time since to this time, had not nor hath any goods or chattels, lands or tenements, in the said county of Warwick, or elsewhere to the knowledge of the said jurors (1), And upon this it is forthwith demanded of the said Peter Hunt, if he hath or knoweth any thing to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who nothing further saith, unless as he before had said. WHEREUPON, all and singular the premises being seen, and by the said justices here fully understood, IT IS CONSIDERED by the court here, that the said Peter Hunt be taken to the gaol of the said lord the king of the said county of Warwick from whence he came, and from thence to the place of execution on Monday now next ensuing, being the ninth day of this instant August, and there be hanged by the neck until he be dead; and that afterwards his body be dissected and anatomized.

Plea: not
guilty.
Issue.

Venire.

Verdict: guilty
of murder.

Judgment of
death,

and dissection.

SECT. 2. CONVICTION OF MANSLAUGHTER.

— upon their oath say, that the said Peter Hunt is not guilty of the murder aforesaid, above charged upon him; but that the said Peter Hunt is guilty of the felonious slaying of the aforesaid Samuel Collins; and that he had not nor hath any goods or chattels, lands or tenements, at the time of the felony and manslaughter aforesaid, or ever afterwards to this time, to the knowledge of the said jurors (1). And immediately it is demanded of the said Peter Hunt, if he hath or knoweth any thing to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: WHO saith that he is a clerk, and prayeth the

Verdict: not
guilty of mur-
der, guilty of
manslaughter.

Clergy prayed.

(1) This averment is now rendered unnecessary. See 7 & 8 Geo. IV. c. 28, § 5; *ante*, p. 387, n. (18).

Judgment to be
burned in the
hand, and de-
livered.

benefit of clergy to be allowed him in this behalf. WHEREUPON, all and singular the premises being seen, and by the said justices here fully understood, IT IS CONSIDERED by the court here, that the said Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand, and is delivered, according to the form of the statute (2).

SECT. 3. ENTRY OF A TRIAL INSTANTER IN THE COURT OF KING'S BENCH, UPON A COLLATERAL ISSUE; AND RULE OF COURT FOR EXECUTION THEREON.

Michaelmas Term, in the Sixth Year of the Reign of King George the Third.

Kent; The King } THE PRISONER at the bar being brought into
against } this court in custody of the sheriff of the county
Thomas Rogers. } of Sussex, by virtue of his Majesty's writ of
habeas corpus, IT IS ORDERED that the said writ and the return thereto be filed. AND it appearing by a certain record of attainder, which hath been removed into this court by his Majesty's writ of *certiorari*, that the prisoner at the bar stands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the said prisoner at the bar having heard the record of the said attainder now read to him, is now asked by the court here, what he hath to say for himself, why the court here should not proceed to award execution against him upon the said attainder. HE for plea saith, that he is not the same Thomas Rogers in the said record of attainder, named, and against whom judgment was pronounced: and this he is ready to verify and prove, &c. To which said plea the honourable Charles Yorke, esquire, attorney general of our present sovereign lord the king, who for our said lord the king in this behalf prosecuteth, being now present here in court, and having heard what the said prisoner at the bar hath now alleged, for our said lord the king by way of reply saith, that the said prisoner now here at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced as aforesaid; and this he prayeth may be inquired into by the country: and the said prisoner at the bar doth the like: THEREFORE let a jury in this behalf immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the said prisoner, to try upon their oath, whether the said prisoner at the bar be the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, or not: because as well the said Charles Yorke, esquire, attorney general of our said lord the king, who for our said lord the king in this behalf prosecutes, as the said prisoner at the bar, have put themselves in this behalf upon the said jury. AND immediately thereupon the said jury come here into court; and being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, and having heard the said record read to them, do say upon their oath, that the said prisoner at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as

Habeas Corpus.
Record of at-
tainer read;
for felony and
robbery.
Prisoner asked
what he can
say in bar of
execution.

Plea; not the
same person.
Replication;

averring that
he is.

Issue joined.

*Venire awarded
instant er.*

Jury sworn.

Verdict: that
he is the same.

(2) Benefit of Clergy and burning
in the hand being now abolished, see
6 Geo. IV. c. 25, 7 and 8 Geo. IV. c.

28. *ante*, p. 374, n. (5), this form will
require alteration accordingly.

aforesaid, in manner and form as the said attorney general hath by his said replication to the said plea of the said prisoner now here at the bar alleged. AND HEREUPON the said attorney general on behalf of our said lord the king now prayeth, that the court here would proceed to award execution against him the said Thomas Rogers upon the said attainder. WHEREUPON, all and singular the premises being now seen and fully understood by the court here, **IT IS ORDERED** by the court here, that execution be done upon the said prisoner at the bar for the said felony in pursuance of the said judgment, according to due form of law: AND it is lastly ordered, that he the said Thomas Rogers, the prisoner at the bar, be now committed to the custody of the sheriff of the county of Kent (now also present here in court) for the purpose aforesaid; and that the said sheriff of Kent do execution upon the said defendant the prisoner at the bar for the said felony, in pursuance of the said judgment, according to due form of law.

Award of execution.

On the motion of Mr. Attorney General.

By the Court.

SECT. 4. WARRANT OF EXECUTION ON JUDGMENT OF DEATH, AT THE GENERAL GAOL DELIVERY IN LONDON AND MIDDLESEX.

London } TO the sheriffs of the city of London; and to the sheriff
and } of the county of Middlesex: and to the keeper of his
Middlesex. } Majesty's gaol of Newgate.

WHEREAS at the session of gaol delivery of Newgate, for the city of London and county of Middlesex, holden at Justice Hall in the Old Bailey, on the nineteenth day of October last, Patrick Mahoney, Roger Jones, Charles King, and Mary Smith, received sentence of death for the respective offences in their several indictments mentioned; Now **IT IS HEREBY ORDERED**, that execution of the said sentence be made and done upon them the said Patrick Mahony and Roger Jones, on Wednesday the ninth day of this instant month of November at the usual place of execution. AND it is his Majesty's command, that execution of the said sentence upon them the said Charles King and Mary Smith be respited, until his Majesty's pleasure touching them be further known.

GIVEN under my hand and seal this fourth day of November, one thousand seven hundred and sixty-eight.

JAMES EYRE, Recorder. (L. S.)

SECT. 5. WRIT OF EXECUTION UPON A JUDGMENT OF MURDER, BEFORE THE KING IN PARLIAMENT.

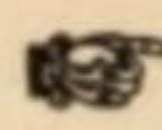
GEORGE the second by the grace of God of Great Britain, France, aud Ireland, king, defender of the faith, and so forth; to the sheriffs of London and sheriff of Middlesex, greeting. WHEREAS Lawrence earl Ferrers, viscount Tamworth, hath been indicted of felony and murder by him done and committed, which said indictment hath been certified before us in our present parliament; and the said Lawrence earl Ferrers, viscount Tamworth, hath been thereupon arraigned, and upon such arraignment hath pleaded not guilty; and the said Lawrence earl Ferrers, viscount Tamworth, hath before us in our said parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our said parliament, that the said Lawrence earl Ferrers, viscount Tamworth, shall be hanged by the neck till

he is dead, and that his body be dissected and anatomized, the execution of which judgment yet remaineth to be done: We require, and by these presents strictly command you, that upon Monday the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him the said Lawrence earl Ferrers, viscount Tamworth, without the gate of our tower of London (to you) then and there to be delivered, as by another writ to the lieutenant of our tower of London or to his deputy directed, we have commanded into your custody you then and there receive: and him, in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn; and that you do cause execution to be done upon the said Lawrence earl Ferrers, viscount Tamworth, in your custody so being, in all things according to the said judgment. And this you are by no means to omit, at your peril. WITNESS ourself at Westminster the second day of May, in the thirty-third year of our reign.

YORKE and YORKE

Joseph W. Poolley

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